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FILED

OCT 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 99CV0858H (J)
	)	
ROBERT R. GRIFFIN,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE OCT 28 1999

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Phil Pinnell, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 28th day of October, 1999.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of October, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Robert R. Griffin, 16428 E. 1st Pl, Tulsa, OK 74108.

Ann L. Hankins
Financial Litigation Agent

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CJ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TWIN CITY FIRE INSURANCE COMPANY, a Connecticut corporation,

Plaintiff,

vs.

No. 99-CV-0440H (M)

CHEROKEE NATION, a public entity; REX EARL STARR, an individual; JENNIE L. BATTLES, an individual; LISA FINLEY, an individual; JOE BYRD, an individual; MARVIN SUMMERFIELD, an individual; ROBIN MAYES, an individual; DAVID CORNSILK, an individual; and CHARLIE ADDINGTON, an individual,

Defendants.

DAVID CORNSILK,

Third Party Plaintiff,

vs.

HARTFORD FIRE INSURANCE COMPANY, a Connecticut corporation; HARTFORD CASUALTY INSURANCE COMPANY, a Connecticut corporation; STATE FARM FIRE AND CASUALTY COMPANY, an Illinois corporation; STATE FARM GENERAL INSURANCE COMPANY, an Illinois corporation; UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas corporation; FARMERS INSURANCE COMPANY, a Kansas corporation; and NATIONAL AMERICAN INSURANCE COMPANY, a Nebraska corporation,

Third Party Defendants.

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW Brently C. Olsson, attorney for Plaintiff, and Julian Fite, attorney for Defendant, Cherokee Nation, and, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, do hereby stipulate to the dismissal of the above-styled and numbered matter without prejudice as to Defendant Cherokee Nation only. Each party will bear their own costs and fees.

Dated this 29 day of October, 1999.

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Julian Fite
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ATTORNEY FOR CHEROKEE NATION

CERTIFICATE OF MAILING

I hereby certify that on this 29 day of October, 1999, I mailed a true and correct copy of the above and foregoing instrument by depositing the same in the United States Mail, to:

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Ernestine Pumphrey for
Julian Fite

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TWIN CITY FIRE INSURANCE COMPANY, a Connecticut corporation,

Plaintiff,

vs.

No. 99-CV-0440H (M)

CHEROKEE NATION, a public entity; REX EARL STARR, an individual; JENNIE L. BATTLES, an individual; LISA FINLEY, an individual; JOE BYRD, an individual; MARVIN SUMMERFIELD, an individual; ROBIN MAYES, an individual; DAVID CORNSILK, an individual; and CHARLIE ADDINGTON, an individual,

Defendants.

DAVID CORNSILK,

Third Party Plaintiff,

vs.

HARTFORD FIRE INSURANCE COMPANY, a Connecticut corporation; HARTFORD CASUALTY INSURANCE COMPANY, a Connecticut corporation; STATE FARM FIRE AND CASUALTY COMPANY, an Illinois corporation; STATE FARM GENERAL INSURANCE COMPANY, an Illinois corporation; UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas corporation; FARMERS INSURANCE COMPANY, a Kansas corporation; and NATIONAL AMERICAN INSURANCE COMPANY, a Nebraska corporation,

Third Party Defendants.

ORDER

NOW on this _____ day of _____, 1999, upon the Joint Stipulation of Dismissal of the Plaintiff, by and through its legal counsel of record, Brently C. Olsson, and Defendant, Cherokee Nation, by and through its legal counsel of record, Julian Fite, the Court orders the Defendant, Cherokee Nation, dismissed without prejudice.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RAY A. LARGE,
SSN: 370-48-1239

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Defendant.

FILED

OCT 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-C-325-J

ENTERED ON DOCKET

DATE OCT 29 1999

ORDER REMANDING CASE TO COMMISSIONER

Pursuant to the mandate of the United States Court of Appeals for the Tenth Circuit, the above-referenced matter is **REMANDED** to the Commissioner for further proceedings consistent with the Court of Appeals' Order and Judgment entered on August 26, 1999.

Dated this 28th day of October 1999.

Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CAROL A. RUTHERFORD,
SSN: 445-44-6800

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Defendant.

No. 97-C-528-J

ORDER REMANDING CASE TO COMMISSIONER

Pursuant to the mandate of the United States Court of Appeals for the Tenth Circuit, the above-referenced matter is **REMANDED** to the Commissioner for further proceedings consistent with the Court of Appeals' Order and Judgment entered on August 26, 1999.

Dated this 28th day of October 1999.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ILLA A. TULL, SR.,
SSN: 446-64-0302

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Defendant.

No. 98-CV-719-J

ORDER[1/]

Plaintiff, Illa A. Tull, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.[2/] Plaintiff asserts that the Commissioner erred because (1) the Plaintiff's limitations meet or equal Listing 12.05, and (2) the ALJ's findings at Step Four are not based on substantial evidence. For the reasons discussed below, the Court **REVERSES and REMANDS** the Commissioner's decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was born March 11, 1959. [R. at 40]. Plaintiff was 36 years old at the time of the hearing before the ALJ. [R. at 59]. Plaintiff completed the eleventh grade

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1/ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

2/ Administrative Law Judge Tela L. Gatewood (hereafter "ALJ") concluded that Plaintiff was not disabled on January 13, 1997. [R. at 13]. Plaintiff appealed to the Appeals Counsel. The record submitted to the Court did not contain the Appeals Council decision reviewing the decision of the ALJ, although the table of contents states that the decision is at pages 4-5 of the record. Plaintiff submitted, with no objection from the Defendant, copies of the decision of the Appeals Council as an addendum to the record on October 25, 1999.

and approximately three-fourths of his twelfth grade year. [R. at 40]. Plaintiff did not graduate from high school. [R. at 40]. Plaintiff attended special education classes in high school and took some courses in diesel mechanics. [R. at 40].

According to Plaintiff he generally sits during the day, watches television, and sometimes sleeps. [R. at 51]. Plaintiff testified that he does not clean the house, cook, or do the laundry. [R. at 49].

Plaintiff stated that his knee feels like gravel is inside of it. Plaintiff additionally testified that he has pain at the lower part of his back which feels as though someone has stuck a knife in his back. [R. at 55]. According to Plaintiff, he had previously been prescribed some pain medications, but the pain medications made him sick so he did not take them. [R. at 56]. Plaintiff does no physical therapy or exercises. [R. at 56]. Plaintiff's medication list indicates that he takes Tylenol for pain.

Plaintiff testified that he could walk approximately 50 to 100 feet, that he could stand approximately ten to fifteen minutes, that he could sit ten to fifteen minutes, that he could lift ten to fifteen pounds, and that he was unable to climb stairs without his back hurting. [R. at 57]. Plaintiff acknowledged that he had been sitting for approximately one hour at the hearing but stated that he was uncomfortable and had to use his arm to push himself off of the seat to enable him to sit for that length of time. [R. at 67].

Plaintiff stated that he was unable to read or spell and that he could not "make change." [R. at 60].

A Mental Residual Functional Capacity Assessment was completed September 2, 1993, by Ron Smallwood, Ph.D. [R. at 120]. It indicates that Plaintiff is markedly limited in the ability to understand and remember detailed instructions, and the ability to carry out detailed instructions. [R. at 120]. Plaintiff's limitations are described as "not significantly limited" in all other assessment areas. [R. at 120-21]. Dr. Smallwood noted that Plaintiff can perform simple tasks, can interact, and can adapt to work situations. [R. at 122]. Dr. Smallwood completed a Psychiatric Review Technique form on September 2, 1993. He indicated that Plaintiff had a valid verbal, performance, or full scale I.Q. of 60 through 70. [R. at 138]. He rated Plaintiff as having slight restrictions of activities of daily living, slight difficulties in maintaining social functioning, often deficiencies of concentration, and no episodes of deterioration or decompensation in work or work-like settings. [R. at 141].

On June 23, 1993, Plaintiff indicated he cooked roughly 50 percent of the time, and that he drove approximately 20 percent of the time, but that he could not sit for long periods of time. At a disability interview in July of 1993, Plaintiff indicated that he did dishes and babysat the children while his wife worked. [R. at 181]. Plaintiff noted that he saw his friends once in a while and his relatives approximately two times each week. [R. at 172].

Plaintiff completed a pain questionnaire on August 3, 1993. [R. at 187]. Plaintiff noted that he took Tylenol four times each day for pain.

In April of 1993, Plaintiff dropped a large wrench on his right eye and sought medical attention. [R. at 191].

Plaintiff had a consultative examination with B.G. Henderson, D.O. Plaintiff complained of "bumps on his spine," which the doctor informed him were normal. [R. at 195]. Plaintiff also complained of problems with his knee. The doctor noted that Plaintiff was able to bend it to its maximum motion without difficulty and that Plaintiff did not limp, favor, or appear to have any other trouble with his knee. [R. at 195]. The doctor noted no swelling over his joints. [R. at 196]. The doctor observed that Plaintiff's back had a normal curve. Plaintiff was noted as having a history of surgery on the right knee with no swelling, pain or tenderness, and a history of back pain which was unsubstantiated by X-rays or other diagnostic procedures. [R. at 197].

Plaintiff was examined on August 18, 1993, by Minor Gordon, Ph.D. The examiner commented that Plaintiff ambulated with no apparent handicap and was in the "high part of the range of mild retardation." [R. at 202]. In addition, the examiner concluded that Plaintiff was capable of performing some type of routine repetitive task on a regular basis. [R. at 202].

Plaintiff was evaluated for complaints of back pain on September 29, 1993, by Robert B. Thompson, M.D. [R. at 204]. Dr. Thompson noted that the X-ray revealed a "slightly lordotic curve of the spine." [R. at 205]. Dr. Thompson saw no significant disk space narrowing or degenerative changes. [R. at 205]. Dr. Thompson concluded that Plaintiff was disabled because he had been unemployed, except for a short period of time, for the past two years, because his lumbar pain would continue and he therefore could not perform construction work or manual labor, and because his mental limitations would prevent him from retraining for other work. [R. at 205].

Plaintiff's I.Q. test indicated a verbal I.Q. of 66, a performance I.Q. of 70, and a full-scale I.Q. of 66. [R. at 260].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims. See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).[3/]

[3/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[4/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence

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[4/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when he uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff was not disabled by decision dated January 13, 1997. [R. at 13-31]. The ALJ determined that Plaintiff could perform his past relevant work. In addition, the ALJ identified other jobs in the national economy which Plaintiff could perform. [R. at 23-24].

IV. REVIEW

LISTING 12.05C

Plaintiff initially asserts that the ALJ did not address whether or not Plaintiff met Listing 12.05C, but limited the inquiry to other Listings. The ALJ did not specifically state "Listing 12.05C" in her analysis. However, the Court concludes that the ALJ did address this Listing. The ALJ does specify Listing 1.05C and Listing 1.00. In the paragraph of the ALJ's decision addressing these Listings, the ALJ additionally writes "[t]he claimant does not meet any of the mental listings, as described below." [R. at 20]. Although perhaps not a model of clarity, the remainder of the ALJ's opinion

appears to predominantly address Listing 12.05C and whether or not Plaintiff meets that Listing.

Listing 12.05 C relates to mental retardation. It provides that an individual is disabled who has "a valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function." 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 12.05C.

The ALJ noted that Plaintiff's full scale I.Q. was 69. Therefore, to meet Listing 12.05C, Plaintiff must establish that he has another physical or mental impairment imposing additional and significant limitations of function upon him. The remainder of the ALJ's opinion is devoted to examining Plaintiff's "other alleged impairments." Although the ALJ's decision could more clearly identify the specific Listing and the ALJ's conclusion with regard to it, the ALJ does examine the medical evidence and conclude that Plaintiff has no other significant work-related limitation. The Court concludes that the ALJ's analysis is sufficient for the purpose of review, and is supported by substantial evidence.

Plaintiff asserts that the evidence establishes that Plaintiff has been diagnosed with thoracic scoliosis at the C6 to T1 level of his spine, and rotational limitations and curvature of the spine. Plaintiff refers to Dr. Thompson's record. Dr. Thompson noted that X-rays revealed a slight curvature of the spine but that he noted no significant disk space narrowing or degenerative changes. [R. at 205]. The ALJ discussed Dr. Thompson's opinion, noting that Dr. Thompson was an examining rather than a treating physician. [R. at 23]. Plaintiff at the hearing testified that he had been

examined by Dr. Thompson on one occasion. Dr. Thompson noted no knee pain. In addition, Dr. Henderson noted that Plaintiff was able to bend his knee to its maximum motion without difficulty and that Plaintiff did not limp, favor, or appear to have any other trouble with his knee. [R. at 195]. Dr. Henderson additionally noted that Plaintiff had normal back curvature, and otherwise unsubstantiated back pain. Dr. Gordon noted that Plaintiff ambulated with no apparent handicap.

In analyzing Plaintiff's complaints of pain, the ALJ noted several inconsistencies in the record. [R. at 22]. In addition, Plaintiff has relatively few visits to doctors, and testified that he took Tylenol for pain.

Plaintiff asserts that Toradol and Darvocet have been prescribed for him by Dr. Evans. Plaintiff refers to a February 1994 record that is handwritten and difficult to decipher.[5/] Plaintiff's medications lists indicate that he took Tylenol for his pain. Plaintiff testified that he had been prescribed a pain medication but that it made him ill. The record does not indicate numerous visits to the doctor, requests for pain relief, attempts to change or alter medications, or other indications supportive of Plaintiff's complaints of back pain.

The record, in fact, contains very little to support Plaintiff's contentions that he suffers from any other additional impairments. The record contains very few medical records. Plaintiff saw a few consultative mental examiners. Plaintiff did not show for his consultative physical examination. The record additionally contains two examining

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[5/] It is possible to decipher the words "toradol" and "darvocet."

physician opinions, and one emergency room admission. The Court concludes that the ALJ did not err in finding that Plaintiff did not have other "significant work-related limitations."

STEP FOUR FINDINGS

Plaintiff asserts that the ALJ failed to consider Plaintiff's medically documented limitations in determining Plaintiff's RFC. As discussed above, the record contains very little to support limitations in addition to Plaintiff's mental limitations.

Plaintiff refers to the opinion of Dr. Thompson that Plaintiff was disabled and unable to work because of his lumbar spine. Plaintiff argues that the ALJ fails to properly address Dr. Thompson's opinion.

Initially, the Court notes that Plaintiff did not present this argument to the Appeals Council. Failure by a Plaintiff to present an issue to the Appeals Council is considered waiver of the issue on appeal. See James v. Chater, 96 F.3d 1341 (10th Cir. 1996).

However, the ALJ did address Dr. Thompson's opinion. Initially, the ALJ noted that Dr. Thompson was not a treating physician. Plaintiff testified that he saw Dr. Thompson once. Plaintiff does not articulate any reasons for considering Dr. Thompson a treating physician. In addition, the ALJ concluded that Dr. Thompson's opinion was based on misinformation. The ALJ noted that Dr. Thompson was under the impression that Plaintiff had not worked in the past two years except for one six week exception. Plaintiff does not address this issue. Dr. Thompson wrote:

> I feel that his lumbar pain is likely to continue and it is my recommendation that he is unable to work because of his lumbar spine. Patient's done previously construction work and manual labor type of activities. I do not feel that he is capable of continuing in these endeavors. Patient also has a learning disability by history and is therefore limited as to being retrained for other types of employment.

Dr. Thompson's opinion that Plaintiff is disabled seems in part based on Plaintiff's mental difficulty, his lack of prior work experience, and his inability to be retrained. The conclusions by Dr. Thompson are traditionally considered within the province of the ALJ. See Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir.1994) ("A treating physician may also proffer an opinion that a claimant is totally disabled. That opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Secretary.") *citing* 20 C.F.R. §§ 404.1527(e)(2) and 416.927(e)(2). Nothing in Dr. Thompson's opinion is inconsistent with the ALJ's conclusion that Plaintiff could perform certain types of work activity. In addition, the record contains two examining physician's reports. The ALJ is the initial evaluator of credibility, and the ALJ's opinion is given due deference on appeal. The Court concludes that the ALJ provided sufficient reasons for declining to accept Dr. Thompson's opinion with regard to the ultimate conclusion of disability.

Plaintiff objects that the ALJ failed to make any specific findings with regard to Plaintiff's past relevant work and therefore did not comply with Henrie v. U.S. Health & Human Services, 13 F.3d 359 (10th Cir. 1993).

Social Security Regulation 82-62 requires an ALJ to develop the record with respect to a claimant's past relevant work.

> The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision.
>
> . . . .
>
> [D]etailed information about strength, endurance, manipulative ability, mental demands and other job requirements must be obtained as appropriate. This information will be derived from a detailed description of the work obtained from the claimant, employer, or other informed source. Information concerning job titles, dates work was performed, rate of compensation, tools and machines used, knowledge required, the extent of supervision and independent judgment required, and a description of tasks and responsibilities will permit a judgment as to the skill level and the current relevance of the individual's work experience.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982). The ALJ must make specific factual findings detailing how the requirements of claimant's past relevant work fit the claimant's current limitations. The ALJ's findings must contain:

1. A finding of fact as to the individual's RFC.
2. A finding of fact as to the physical and mental demands of the past job/occupation.
3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993).

The ALJ does provide some discussion of Plaintiff's residual functional capacity. However, the ALJ's opinion contains virtually nothing with regard to the requirements or demands of Plaintiff's past relevant work, and whether or not Plaintiff can perform those demands. The ALJ notes that Plaintiff's past relevant work was medium and

states that, in accordance with the testimony of the vocational expert, Plaintiff can perform medium work. The Court concludes this is insufficient for two reasons. First, the reliance on the testimony of the vocational expert is frowned upon by the Tenth Circuit Court of Appeals. See Winfrey v. Chater, 92 F.3d 1017, (10th Cir. 1996) ("This practice of delegating to a VE many of the ALJ's fact finding responsibilities at step four appears to be of increasing prevalence and is to be discouraged."). Second, the record simply contains insufficient detail with regard to Plaintiff's past relevant work and whether or not Plaintiff can perform it. The Plaintiff listed, in his vocational report, nine different jobs performed over a period less than ten years. Plaintiff performed work at most of the jobs for less than one year, and at several of the jobs Plaintiff worked for less than a few months.[6/] [R. at 163]. For numerous listed jobs, Plaintiff noted that he was required to write reports or determine parts lists but that he was unable to perform the required task and the job ended or he was fired. [R. at 158-161]. The record contains few details with regard to the type of work Plaintiff performed at each of his previous jobs.[7/] The vocational expert, based on these few

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[6/] Plaintiff testified that he worked helping his dad install glass for about two years and cleaned mechanics parts for about three years. This testimony seems to contradict the vocational report submitted by Plaintiff. Plaintiff stated the glass helping job "ended," and he had to quit the parts cleaning job because they required a commercial driver's license which he could not obtain. With regard to one of his welding jobs, Plaintiff testified that he could not weld and had to leave the job. [R. at 45]. Plaintiff left one parts cleaning job for a different parts cleaning job. [R. at 45]. Some of Plaintiff's jobs "ended up quitting." [R. at 46]. Whether this means that Plaintiff was fired from the job or that Plaintiff quit the job is unclear from the record. Plaintiff was laid off at AMC and was fired from Thermo King. [R. at 46]. Plaintiff testified he was fired from a trucking company because he could not do the type of work they wanted. [R. at 48]. Plaintiff additionally stated that he was listed as a "shop foreman" at one job because he could not perform any of the job duties and "they quit on me." [R. at 53].

[7/] Plaintiff testified that as a "glass installer," he did not install glass, but he carried glass which weighed between 80 and 200 pounds. [R. at 61]. When Plaintiff cleaned parts he lifted between 50 and 100 pounds. [R. at 62].

details, generalized Plaintiff's past relevant work as that of a "general helper" that is unskilled and medium physical demand. The ALJ's discussion of the jobs in her opinion contains even less information. The Court concludes that this is simply insufficient to comply with Winfrey.[8/]

Plaintiff notes the Step Five findings by the ALJ but merely states that the findings confuse the issue and are unnecessary. Defendant notes the Step Five conclusions and suggests that the Court may alternatively affirm because the ALJ concluded, at Step Five, that other jobs exist in the national economy which Plaintiff can perform. Defendant refers the Court to Berna, v. Chater, 101 F.3d 631, 633 (10th Cir. 1996). Defendant is correct that, in the "average" Social Security case alternative findings pursuant to Step Five permit an affirmance even when an ALJ's findings at Step Four cannot be affirmed. In a Listing 12.05C case, however, case law suggests otherwise. See Hinkle v. Apfel, 132 F.3d 1349, 1352 n.4 (10th Cir. 1997) ("Needless to say, a claimant's inability to perform his past relevant work would meet the second prong of § 12.05C."). If Plaintiff cannot perform his past relevant work, he must, by necessity have some other limitation that would otherwise interfere with his ability to do significant work activity, and he is considered disabled.

[8/] The Court has affirmed the ALJ's conclusion that Plaintiff did not meet the Listing for 12.05C. Affirming this part of the ALJ's decision necessitates a finding that Plaintiff has no other mental or physical limitations other than Plaintiff's I.Q. Logically, therefore, Plaintiff should be able to return to any past relevant work Plaintiff was previously performing. If a Plaintiff had no difficulty performing the work at Plaintiff's stated I.Q., and Plaintiff has no other limitations, nothing should prevent Plaintiff from returning to his "past relevant work." Under the specific circumstances in this case, however, and due to Plaintiff's sporadic work history, and the seeming contradictions in the record (Plaintiff testified that he was at one job for three years and listed on his vocational report a shorter period of time), the Court believes that further development of the Step Four analysis is dictated.

V. CONCLUSION

The record contains substantial evidence to support the ALJ's conclusion that Plaintiff does not meet Listing § 12.05C. On remand, the ALJ should evaluate whether or not Plaintiff can perform his past relevant work in accordance with Henrie.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

Dated this 28 day of October 1999.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ILLA A. TULL, SR.,
SSN: 446-64-0302

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,

Defendant.

FILED
OCT 28 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-719-J

ENTERED ON DOCKET
DATE OCT 29 1999

JUDGMENT

This action has come before the Court for consideration and an Order reversing the Commissioner's decision and remanding the case to the Commissioner for further proceedings has been entered. Consequently, Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 28th day of October 1999.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THERESA ROBINSON,

Plaintiff,

vs.

TERRENCE DURHAM, individually, AUTO MARKETING NETWORK, INC., a Florida corporation; and IMPERIAL CREDIT INDUSTRIES, INC., a California corporation,

Defendants.

Case No. 98-CV-613-BU

ENTERED ON DOCKET

DATE OCT 29 1999

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 28th day of October, 1999.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 28 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

EDWARD L. GOODWIN, ET AL.,

Plaintiffs,

vs.

FARMERS INSURANCE GROUP OF COMPANIES, ET AL.,

Defendants.

Case No. 99-CV-395-BU

ENTERED ON DOCKET
DATE OCT 29 1999

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 28th day of October, 1999.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

LINDA ANNETTE DRUMMOND,)
)
Plaintiff,)
)
vs.) Case No. 99-CV-627-BU(E)
)
JIM HOUK SEAMLESS GUTTERING AND SUPPLY, INC.,)
)
Defendant.)

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this _____ day of October, 1999.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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MT 10-22-99

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN R. RUDY,	)	
	)	
Plaintiff,	)	
vs.	)	**NO. 99CV008-B (E)**
	)	
MS LIFE INSURANCE COMPANY,	)	
a foreign insurance company, and	)	
LOAN SERVICING ENTERPRISES,	)	
	)	
Defendants.	)	

JUDGMENT OF DISMISSAL WITH PREJUDICE
AS TO DEFENDANT MS LIFE INSURANCE COMPANY

This Court, being advised that this cause has been compromised and settled with respect to any and all claims asserted by Plaintiff John R. Rudy against Defendant MS Life Insurance Company ("MS Life") to the satisfaction of the aforementioned parties and that there remain no issues to be adjudicated or determined by the Court respecting such claims, finds that such claims should be dismissed with prejudice in their entirety.

IT IS, THEREFORE, ORDERED AND ADJUDGED that any and all claims of Plaintiff against Defendant MS Life be, and hereby are, dismissed with prejudice in their entirety with said parties to bear their own costs.

SO ORDERED AND ADJUDGED, this the 26 day of Oct, 1999.

UNITED STATES ~~MAGISTRATE~~ JUDGE

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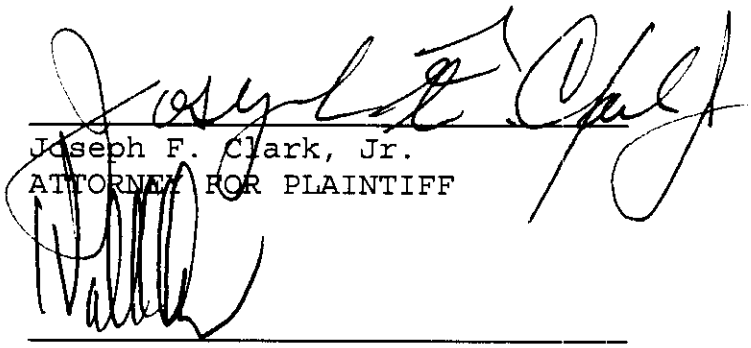
AGREED AND APPROVED:



Joseph F. Clark, Jr.
ATTORNEY FOR PLAINTIFF

Walter D. Willson
Jonathan T. McCants
ATTORNEYS FOR MS LIFE INSURANCE COMPANY

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

DERONN WRATHER, STEPHEN WILLIAMS, & VINCENT TURNER,

Plaintiffs,

vs.

THE CITY OF TULSA, a municipal corporation, et al.,

Defendants.

Case No. 97-CV-435-BU(M)

ORDER

Plaintiffs, Deronn Wrather, Stephen Williams and Vincent Turner, bring this civil action seeking damages pursuant to 42 U.S.C. § 1983 based upon events which occurred after a Ku Klux Klan rally in Tulsa, Oklahoma on May 4, 1996. Specifically, Plaintiffs allege that their constitutional rights under the First and Fourteenth Amendments were violated because they, along with other citizens, were attacked by foot patrol officers, horse mounted officers and pepper gas while peacefully assembled on a public sidewalk, so that Ku Klux Klan members and supporters could have exclusive use of the public sidewalk. Plaintiffs also claim that their constitutional rights under the Fourth Amendment were violated because they were arrested without probable cause. Plaintiffs, Deronn Wrather and Stephens Williams, further allege that their constitutional rights under the Fourth Amendment were violated because unreasonable and excessive force was used in effectuating their arrests. In addition to the § 1983 claims,

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Plaintiffs allege state law claims of intentional infliction of emotional distress, assault and battery and malicious prosecution.

Presently before the Court are the motions of Defendants, Bill Yelton, Michael Eckert, Charles Jordan, Steven Middleton, B. Bonham, Chris Witt, Sgt. Jim Clark, Major W.B. York, Corporal A. Wilson, Kevin Johnson, Ron Palmer, Susan Savage and the City of Tulsa, for summary judgment pursuant to Rule 56(c), Fed. R. Civ. P. Upon due consideration of the parties' submissions, the Court makes its determination.[1]

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the record, the Court views the evidence and draws any inferences therefrom in the light most favorable to the party opposing summary judgment. Latta v. Keryte, 118 F.3d 693, 697 (10th Cir. 1997)(citing Coosewoon v. Meridian Oil Co., 25 F.3d 920, 929 (10th Cir. 1994)).

In their motions, the individual Defendants have raised the affirmative defense of qualified immunity as to Plaintiffs' § 1983 claims. When a public official raises the defense of qualified immunity on summary judgment, special rules apply. Hinton v. City

[1] Plaintiffs have filed a Motion to Strike Defendants' Reply Briefs and an Opposed Application for Surreply. Upon review, the Court finds that Plaintiffs' Motion to Strike Defendants' Reply Briefs should be denied and the Plaintiffs' Opposed Application for Surreply should be granted.

of Elwood, Kansas, 997 F.2d 774, 779 (10th Cir. 1993). The plaintiff must initially make a two-fold showing. Id. First, the "`[p]laintiff has the "burden to show with particularity facts and law establishing the inference that defendant violated a constitutional right."'" Hollingsworth v. Hill, 110 F.3d 733, 737 (10th Cir. 1997)(quoting Abeyta v. Chama Valley Indep. Sch. Dist., 77 F.3d 1253, 1255 (10th Cir. 1996)(quoting Walter v. Morton, 33 F.3d 1240, 1242 (10th Cir. 1994)). Second, the plaintiff must demonstrate that "`the constitutional rights . . . the defendant allegedly violated were clearly established at the time of the conduct at issue.'" Id. (quoting Albright v. Rodriguez, 51 F.3d 1531, 1534 (10th Cir. 1995)). Ordinarily, for the law to be "clearly established," there must be a Supreme Court or Tenth Circuit decision on point or the weight of authority from other circuits must be as the plaintiff maintains, and "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." V-1 Oil Co. v. Means, 94 F.3d 1420, 1422 (10th Cir. 1996)(quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). If the plaintiff makes the required two-fold showing, the public official then bears the usual summary judgment movant's burden of showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. Hinton, 997 F.2d at 779. Specifically, the defendant must show that "`"no material issues of fact remain as to whether the defendant's actions were objectively reasonable in

light of the law and information the defendant possessed at the time of his actions."'" Hollingsworth, 110 F.3d at 737 (quoting Guffey v. Wyatt, 18 F.3d 869, 871 (10th Cir. 1994)(quoting Salmon v. Schwarz, 948 F.2d 1131, 1136 (10th Cir. 1991)); see also, Hinton, 997 F.2d at 779.

Guided by the above principles, the Court turns first to Plaintiffs' First Amendment claim against the individual Defendants. The First Amendment to the Constitution provides in part that "Congress shall make no law ... abridging the ... right of the people peaceably to assemble." This right has long been made applicable to the states by the Fourteenth Amendment. De Jonge v. Oregon, 299 U.S. 353, 364 (1937). "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." Id. People assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed, they may "assembl[e] for any lawful purpose." Hague v. CIO, 307 U.S. 496, 519 (1939)(opinion of Stone, J.). Subject to the traditional time, place, and manner restrictions, see, Cox v. New Hampshire, 312 U.S. 569, 574-576 (1941); Cox v. Louisiana, 379 U.S. 559, 560-564 (1965), public streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised, see, Hague, 307 U.S. at 515 (opinion of Roberts, J.).

The Court finds that Plaintiffs have sufficiently shown facts from which a reasonable jury might conclude that a violation of their constitutional right to peaceably assemble may have occurred.

Plaintiffs, through the affidavit of Plaintiff, Vincent Turner, reveal that they were peaceably assembled on a public sidewalk with other citizens after the Ku Klux Klan rally. In his affidavit, Mr. Turner testifies that when the Ku Klux Klan members were leaving the scene and immediately thereafter, some of the members of his group were yelling hostile comments. However, Mr. Turner testifies that these initial taunts quickly subsided. He also testifies that some ten to fifteen minutes later approximately eight police officers arrived at the scene and formed a line in front of the group. Mr. Turner testifies that no person or persons threatened the officers, charged the officers' line or made any hostile gestures to the police officers. Further, Mr. Turner testifies that there was no warning before the horse attack and that when the horses entered the crowd the officers immediately sprayed O.C.[2] gas.

Although Plaintiffs have shown facts from which a reasonable jury may conclude that their First Amendment right to peaceful assembly was violated, the Court concludes that Plaintiffs have not shown that all of the Tulsa police officers named as Defendants in this action caused or contributed to the alleged violation of their First Amendment right. The Court has examined the record and viewing the evidence in a light most favorable to Plaintiffs, it appears that Defendants, Bill Yelton, Michael Eckert, Steven Middleton and B. Bonham, were part of the skirmish line that

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[2] According to the record, the term "O.C." stands for Oleoresin Capscium.

assisted in attempting to disperse the crowd. It also appears that Sgt. Jim Clark and Sgt. Charles Jordan conferred about the situation with Major W.B. York and they decided to disperse the crowd. It further appears that Sgt. Jim Clark and Sgt. Charles Jordan were involved in attempting to disperse the crowd. As to Defendants, Chris Witt, Kevin Johnson and Cpl. A. Wilson, there is no evidence in the record that they were involved in the skirmish line or were on mounted horses or sprayed pepper gas on the crowd. In regard to Cpl. A. Wilson, the record only shows that he advised Sgt. Jim Clark of the crowd gathered on the street and that later, he directed Officer Rodney Russo to arrest Shannon Johnson, one of the members of the crowd, for inciting a riot. There is no showing in the record by Plaintiffs that he was involved in dispersing the allegedly peaceful crowd. Because there is no showing by Plaintiffs that these individual Defendants violated their First Amendment right to peaceably assemble, the Court finds that these individual Defendants are entitled to qualified immunity on the First Amendment claim.

As to the second part of Plaintiffs' two-part burden, the Court finds that Plaintiffs have shown that the constitutional right to peaceably assemble on the public sidewalk was clearly established in May of 1996. In Edwards v. South Carolina, 372 U.S. 229 (1963), and in Cox v. Louisiana, 379 U.S. 536 (1965), the Supreme Court overturned convictions for breach of the peace for black defendants who were marching peaceably on a public sidewalk to publicize their dissatisfaction with discriminatory actions

against blacks. The Supreme Court found that the convictions in part violated the defendants' First Amendment rights of free assembly. The Supreme Court, in Edwards, noted that there was no violence or threat of violence on the part of the marchers or on the part of any member of the crowd watching them. It also noted that the marchers were not in violation of any law. The Supreme Court found that by marching peaceably on a public sidewalk and peaceably expressing their grievances, the defendants were exercising basic constitutional rights in their most pristine and classic form.

Because Plaintiffs have satisfied their two-part burden, the individual Defendants, Bill Yelton, Michael Eckert, Charles Jordan, Steven Middleton, B. Bonham, Sgt. Jim Clark, and Major W.B. York, have the burden to show no material issues of fact remain as to whether their actions were objectively reasonable in light of the law and information they possessed at the time of their actions. The Court, upon review, finds that Defendants have failed to satisfy their burden. The Court concludes that there are questions of material fact as to whether the individual Defendants' actions were objectively reasonable. The individual Defendants have presented evidence that the officers wanted to disperse the crowd in order to allow the Ku Klux Klan sympathizers to have access to their cars. The individual Defendants have submitted evidence to show that several members of the gathered crowd were in the street kicking passing cars; that they were making threats to Ku Klux Klan sympathizers; that they had refused to move out of the street when

directed by the officers; that they made threats against the officers; that they had been warned that horses would come in if they did not disperse and that the crowd still refused to disperse and responded with taunts against the officers. However, the affidavit testimony of Plaintiff, Vincent Turner, disputes such evidence. Therefore, because genuine issues of material fact remain in regard to the First Amendment claim, the Court finds that Defendants, Bill Yelton, Michael Eckert, Charles Jordan, Steven Middleton, B. Bonham, Sgt. Jim Clark, and Major W.B. York are not entitled to qualified immunity on that claim.

The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This Clause embodies "a general rule that States must treat like cases alike but may treat unlike cases accordingly." Vacco v. Quill, 521 U.S. 793, 117 S.Ct. 2293, 2297, 138 L.Ed.2d 834 (1997). Unless a legislative classification or distinction targets a suspect class, courts will uphold it if it is rationally related to a legitimate end. Id.

Plaintiffs, in this case, are African-Americans. Plaintiffs contend that the individual Defendants removed them from the public in order to give the white Ku Klux Klan sympathizers exclusive use of the sidewalk. The Court, however, finds that Plaintiffs have not shown that the individual Defendants targeted them because of their race. While it is true the crowd gathered on the public sidewalk were predominately black, the record in the case shows

that white individuals were also a part of the crowd and that they, along with Plaintiffs, were subjected to the dispersement by foot officers, horse-mounted officers and pepper gas. Contrary to Plaintiffs' allegations, none of the police officers' reports in the record indicate that the crowd was removed because of their race. Thus, Plaintiffs have not shown that the individual Defendants took action against Plaintiffs based upon their race.

The Court also finds that Plaintiffs have not met their burden of showing a constitutional violation under the Equal Protection Clause as they have not shown that the individual Defendants treated them differently than others similarly situated. The allegation that a plaintiff was treated differently from those similarly situated is an essential element of an equal protection claim. Hennigh v. City of Shawnee, 155 F.3d 1249, 1257 (10th Cir. 1998); see also, Gehl Group v. Koby, 63 F.3d 1528, 1538 (10th Cir. 1995). Therefore, because Plaintiffs have failed to show that they were treated differently than those similarly situated, the Court finds that the individual Defendants are entitled to qualified immunity on Plaintiffs' Fourteenth Amendment claims.

In the Second Amended Complaint, Plaintiffs allege that they were arrested without probable cause in violation of the Fourth Amendment. The Fourth Amendment guarantee of an individual's right not to be arrested without probable cause was clearly established long before Plaintiffs' arrests. Beck v. Ohio, 379 U.S. 89, 91 (1964). An arrest without a warrant is proper as long as the arresting officer has probable cause to believe that the arrestee

has committed a crime. Romero v. Fay, 45 F.3d 1472, 1476 (10th Cir. 1995). A defendant is "entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest" a plaintiff. Hunter v. Bryant, 502 U.S. 224, 228 (1991). "Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense." Jones v. City & County of Denver, 854 F.2d 1206, 1210 (10th Cir. 1988).

As to Plaintiff, Vincent Turner, the Court finds that Plaintiff has presented facts from which a reasonable jury may conclude that he was arrested without probable cause. According to the record, Plaintiff was arrested for disorderly conduct. In his affidavit, Plaintiff testifies that he never stated a loud or angry word to any person. He also testifies that no police officer asked him to leave. Plaintiff testifies that at no time did he fail to obey an order nor did he encourage another person to fail to obey an order. Plaintiff further testifies that police officers simply grabbed him and handcuffed him without reason and warning.

The Court notes that Plaintiff, Vincent Turner, has not identified the individual Defendants who were involved in his arrest. The record in this case reveals that Defendant, Sgt. Jim Clark, ordered Defendant, B. Bonham, to arrest Plaintiff. As to the individual Defendants, Bill Yelton, Michael Eckert, Charles Jordon, Steven Middleton, Chris Witt, Major W.B. York, Cpl. A.

Wilson and Kevin Johnson, Plaintiff has failed to allege facts to show that they violated Plaintiff's constitutional right under the Fourth Amendment to be free from false arrest. Plaintiff has failed to present any evidence that any of these individual Defendants were involved in Plaintiff's arrest. Moreover, Plaintiff has failed to demonstrate that any of these Defendants had an opportunity to intervene in preventing the arrest. See, Mick v. Brewer, 76 F.3d 1127, 1136 (10th Cir. 1996); Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423, 1433 (10th Cir. 1984) (ruling that officer who did not prevent fellow officer's use of allegedly excessive force against arrestee "may be liable [under § 1983] if he had the opportunity to intervene but failed to do so"), vacated on other grounds, 474 U.S. 805, 106 S.Ct. 40, 88 L.Ed.2d 33 (1985). The Court, therefore, concludes that the individual Defendants, Bill Yelton, Michael Eckert, Charles Jordan, Steven Middleton, Chris Witt, Major W.B. York, Cpl. A. Wilson and Kevin Johnson, are entitled to qualified immunity on Plaintiff's Fourth Amendment claim for false arrest.

As to the individual Defendants, Sgt. Jim Clark and B. Bonham, the Court finds that they are not entitled to qualified immunity. Plaintiff has satisfied his two-fold burden of alleging a constitutional violation and that the law was clearly established at the time of his arrest. The Court concludes that Defendants have not demonstrated that no genuine issues of material fact exist as to whether Defendants' conduct was objectively reasonable in light of the law. Although Defendants rely upon police records to

establish probable cause, the Court, in light of Plaintiff's affidavit, concludes that genuine issues of fact exist as to whether probable cause existed to arrest Plaintiff for disorderly conduct.

In their motion, Defendants, citing to Baptiste v. J. C. Penney Co., 147 F.3d 1252, 1260 (10th Cir. 1998), contend that Defendant, B. Bonham, is entitled to qualified immunity because he reasonably relied upon information received from Defendant, Sgt. Jim Clark, to arrest Plaintiff, Vincent Turner. From the record in this case, the Court, however, cannot say as a matter of law that Defendant, B. Bonham reasonably relied on Defendant, Sgt. Jim Clark's order to arrest Plaintiff. All the Court can glean from the record is that Defendant, Sgt. Jim Clark, ordered Defendant, B. Bonham, to arrest Plaintiff and acting on that order Defendant, B. Bonham arrested Plaintiff. The Court is not aware of the communication between Defendants in regard to the order to arrest. For example, the Court does not know if Sgt. Jim Clark explained the circumstances which led him to believe that Plaintiff should be arrested for disorderly conduct. In the absence of facts speaking to the reasonableness of Defendant, B. Bonham's reliance on the order to arrest, the Court concludes that Defendant, B. Bonham, is not entitled to summary judgment on Plaintiff's false arrest claim. Saffold v. City of Calumet Park, Illinois, 47 F.Supp.2d 927, 935 (N.D. Ill. 1999).

As to Plaintiff, Deronn Wrather, the Court finds that Plaintiff has presented facts from which a reasonable jury may

conclude that Defendant, Michael Eckert, violated her Fourth Amendment right to be free from false arrest. The record shows that the reason Defendant, Michael Eckert, approached Plaintiff, Deronn Wrather, was to arrest her for the misdemeanor crime of obstructing officers. Plaintiff, through the affidavit of Plaintiff, Vincent Turner, has alleged that although she initially had her hands on Mr. Turner's legs, she still allowed the officers to move forward. She has also alleged that she then yelled "no, no, no" and without warning was grabbed by Defendant, Michael Eckert.

The Court notes that Plaintiff, Deronn Wrather, has only identified Defendant, Michael Eckert, as the person involved in her arrest. Plaintiff has not alleged any facts to show that Defendants, Bill Yelton, Charles Jordan, Steven Middleton, B. Bonham, Chris Witt, Sgt. Jim Clark, Major W.B. York, Cpl. A. Wilson and Kevin Johnson, violated Plaintiff's constitutional right under the Fourth Amendment to be free from false arrest. Plaintiff has failed to show that any of these individual Defendants were involved in Plaintiff's arrest in any manner. Bennett v. Passic, 545 F.2d 1260, 1262-63 (10th Cir. 1976)(plaintiff must show defendant personally participated in the alleged violation to state a claim under § 1983). Moreover, Plaintiff has failed to show that any of these Defendants had an opportunity to intervene in preventing the arrest. Lusby, 749 F.2d at 1433. The Court, therefore, concludes that the individual Defendants, Bill Yelton, Charles Jordan, Steven Middleton, B. Bonham, Chris Witt, Sgt. Jim

Clark, Major W.B. York, Cpl. A. Wilson and Kevin Johnson, are entitled to qualified immunity on Plaintiff's Fourth Amendment claim for false arrest.

As to Defendant, Michael Eckert, the Court finds that he is not entitled to qualified immunity. Plaintiff has satisfied his two-fold burden of alleging a constitutional violation and that the law was clearly established at the time of his arrest. The Court concludes that Defendant has not satisfied his burden that no genuine issues of material fact exist as to whether Defendant's conduct was objectively reasonable. The Court notes that Defendant has not set forth the elements for the misdemeanor crime of obstructing officers. At Stephen Williams' trial, Defendant testified that Plaintiff was arrested because she was interfering with Mr. Turner's arrest by prohibiting the officers from performing the handcuffing duties.[3] However, Defendant also testified that he was not certain that the officers were attempting to get the handcuffs on him. The videotapes submitted by Plaintiff do not show her prohibiting the officers from performing the handcuffing duties. Defendant, however, also testifies that Plaintiff was backed up to her husband and had her arms behind her. On the record before it, however, the Court cannot determine whether these facts and any other facts that Defendant may have had knowledge of would lead a prudent person to believe that Plaintiff was committing the misdemeanor crime of obstructing officers in his

[3] In his arrest report, Defendant, Michael Eckert, also states that Plaintiff tried to keep officers from placing handcuffs on Plaintiff, Vincent Turner.

presence. Therefore, the Court finds that Defendant, Michael Eckert, is not entitled to qualified immunity on Plaintiff's Fourth Amendment claim for false arrest.

In regard to Plaintiff, Stephen Williams, Defendants maintain that Plaintiff is precluded from re-litigating the issue of probable cause for his arrest in this case as such issue was previously determined in Plaintiff's criminal proceeding. Defendants, in support of their position, rely upon Hubbert v. City of Moore, 923 F.2d 769 (10th Cir. 1991), wherein the Tenth Circuit ruled that the plaintiffs in a civil rights action were precluded from re-litigating the issue of probable cause for their arrest because the issue had been decided during a preliminary hearing in an earlier criminal proceeding. In reaching its decision in Hubbert, the Tenth Circuit relied upon Adamson v. Dayton Hudson Corp., 774 P.2d 478 (Okla.Ct.App. 1989), which held that a finding of probable cause at a preliminary hearing precluded a plaintiff in a civil suit for false arrest from re-litigating the issue of probable cause. Since the Hubbert decision, the Oklahoma Supreme Court has addressed the issue and has also determined that an order at a preliminary hearing binding over a defendant for criminal trial precludes a plaintiff from re-litigating the issue of probable cause in a subsequent civil suit for false arrest following acquittal. Christopher v. Circle K Convenience Stores, Inc., 937 P.2d 77 (Okla. 1997).

In the instant case, Defendants assert that by overruling Plaintiff's demurrer to the state's evidence, the judge in the

criminal proceeding necessarily determined under Oklahoma law, see, State v. Williams, 307 P.2d 163 (Okl.Cr. 1957), that there was proof tending reasonably to sustain the allegations of the charges. As the judge made such determination, Defendants contend that he made a finding of probable cause and Plaintiff cannot re-litigate the issue of probable cause in this case.

Plaintiff, in response, contends that Hubbert is distinguishable from this case as no preliminary hearing was held in Plaintiff's criminal case because he was charged with misdemeanor crimes. Plaintiff asserts that his arrest was not contested at trial. He also contends the Oklahoma Supreme Court in Williams made no distinction between a demurrer and a directed verdict and a directed verdict is regarded as demurrer. Plaintiff contends that the judge sustained his motion for directed verdict after viewing the Eckert #1 videotape of the scene.

Upon review, the Court finds that Plaintiff is precluded from re-litigating the issue of probable cause. Even though a preliminary hearing was not held in the criminal proceeding, the Court concludes that the trial judge, in overruling the demurrer to the state's evidence, inherently made a finding of the existence of probable cause.[4] Under Oklahoma law, to withstand a directed verdict or demurrer, there must be competent evidence reasonably tending to sustain the allegations of the charges. Winrow v. State, 645 P.2d 1019 (Okl.Cr. 1982). The Court finds that

[4] The Court also notes that prior to Plaintiff's criminal trial, the trial judge overruled a motion to dismiss filed by Plaintiff.

Plaintiff had the opportunity to fully and fairly litigate the issue of probable cause prior to the judge's finding as he had the opportunity to fully cross-examine witnesses. The Court therefore concludes that Plaintiff is precluded from re-litigating the issue of probable cause. Because Plaintiff cannot show that he was arrested without probable cause, the Court finds Plaintiff has failed to satisfy his initial two-fold burden and summary judgment in favor of the individual Defendants on Plaintiff, Stephen Williams' false arrest claim is appropriate.

Plaintiffs, Deronn Wrather and Stephen Williams, also allege a Fourth Amendment claim of excessive force. To analyze a Fourth Amendment excessive force claim, the district court begins by "identifying the specific constitutional right allegedly infringed by the challenged application of force." Id. (quoting Graham v. Connor, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). The Tenth Circuit has determined that the Fourth Amendment provides constitutional protection from excessive force after a warrantless arrest but before judicial determination of probable cause to arrest. Pride v. Does, 997 F.2d 712, 716 (10th Cir. 1993). Under the Fourth Amendment, the district court must look to whether the officer's action was "objectively reasonable" in light of all the facts and circumstances, without regard to the officer's subjective motivations. Id.

In Graham, the Supreme Court explained,

> the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . With respect to a claim of excessive

> force. . .[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers . . .violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.

Graham, 490 U.S. at 396-397, 109 S.Ct. at 1872. Relevant factors in determining whether the force used by an arresting officer was objectively reasonable include the severity of the crime, whether the subject posed an immediate threat to the safety of the officer, and whether the subject was resisting arrest. Id.

Initially, the Court notes that in support of her claim that the force used by Defendant, Michael Eckert, was excessive, Plaintiff relies solely upon the Eckert #1 videotape and the opinion of her expert, Lou Reiter. According to Mr. Reiter, Defendant, Michael Eckert, used "unreasonable force in his control" of Plaintiff. The Court, however, declines to consider this expert opinion as the Court finds such evidence would not be admissible at trial. Fed. R. Evid. 704(a) provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." While Rule 704 has abolished the common law "ultimate issue" rule, however, it has not "lower[ed] the bars so as to admit all opinions." Fed. R. Evid. 704 advisory committee's note. The advisory committee's note to Rule 704 illuminates the distinction between admissible and excludable expert's opinion testimony:

> Under Rules 701 and 702, opinions must be helpful to the

> trier of fact, and Rule 403 provides for exclusion of evidence that wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution? would be allowed.

Fed.R.Evid. 704 advisory committee's note.

In this case, Mr. Reiter simply tenders the legal conclusion that Defendant, Michael Eckert's use of force was "unreasonable." The Court finds that this conclusion crosses the line provided by Rule 704. Mr. Reiter's opinion merely tells the factfinder what result to reach on Plaintiff's excessive force claim. In other words, it invades the province of the factfinder. The Court finds that Mr. Reiter's opinion is different from the testimony given by the expert in Zuchel v. City and County of Denver, 997 F.2d 730 (10th Cir. 1993), which was found to be admissible. In that case, the expert had testified that the use of deadly force was inappropriate based upon his understanding of generally accepted police custom and practice. Id. at 742-743. The Tenth Circuit found that such testimony was permissible finding that an expert may testify as to whether the conduct at issue fell below accepted standards in the field of law enforcement. Id. at 742. In this case, Mr. Reiter, in proffering his opinion, has not informed the Court that he is opining in regard to the prevailing standards in the field of law enforcement. Rather, he has only opined that Defendant, Michael Eckert's conduct, was unreasonable and such

opinion, in the Court's view, invades the province of the factfinder. Any factfinder would be capable of assessing the reasonableness of Defendant, Michael Eckert's conduct. Because the Court finds that the opinion crosses the line provided by Rule 704, the Court concludes that such opinion would be inadmissible at trial and must be disregarded for summary judgment purposes. Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir. 1988)(trial court may consider only admissible evidence in ruling on a motion for summary judgment).

As Mr. Reiter's testimony is disregarded, the only evidence in support of Plaintiff's excessive force claim is the Eckert #1 videotape. Upon review of the videotape, the Court concludes that Plaintiff has failed to show that Defendant, Michael Eckert, used unreasonably and excessive force in taking her to the ground. Although Plaintiff was being arrested for a misdemeanor crime and did not pose an immediate threat to the safety of Defendant, Michael Eckert, the videotape submitted by Plaintiff shows that she was in fact resisting her arrest. Before Defendant, Michael Eckert, took Plaintiff to the ground, she was trying to get away and when Defendant grabbed her from behind, she swung her right hand back and hit him. The Court finds that the force used by Defendant, Michael Eckert, was objectively reasonable. Therefore, the Court finds that Defendant, Michael Eckert, is entitled to qualified immunity on Plaintiff's Fourth Amendment excessive force claim.

As to the excessive force claim of Plaintiff, Stephen

Williams, the Court has also disregarded the opinion of Mr. Reiter for the reasons above stated. Consequently, the only evidence relied upon by Plaintiff is the Witt #1 videotape. Upon review of the videotape, the Court finds that Plaintiff has shown facts from which a reasonable jury may conclude that Defendant, Steven Middleton, applied excessive force in kicking Plaintiff. The videotape shows Defendant, Steven Middleton, kicked Plaintiff in the head. At the time of the kick, Plaintiff was on the ground and being held by the police officers. There appears no reason from the videotape for the kick. The Court also finds that Defendant has not established his burden of showing no genuine issues of material fact exist that Defendant's conduct was objectively reasonable. Defendant has presented testimony that he kicked Plaintiff because he was going to bite another officer. However, such testimony was presented for the first time in the individual Defendants' reply brief. As Plaintiff has not had an opportunity to respond to such testimony, the Court concludes that such evidence is not properly considered in determining whether summary judgment is appropriate. Therefore, the Court concludes that Defendant, Steven Middleton, is not entitled to qualified immunity on Plaintiff's Fourth Amendment excessive force claim.

In regard to the other challenged uses of force applied to Plaintiff, Stephen Williams, i.e., the pepper spray, the neck restraint/chokehold, and the standing on one foot, the Court finds that Plaintiff has failed to show that such uses of forces were unreasonable. The Witt #1 videotape shows that Plaintiff was in

fact resisting arrest. Plaintiff was swinging his arms and trying to get away from three of the police officers who were trying to get control of him. It took 5 to 6 officers to get Plaintiff to the ground. The use of the pepper spray, the neck restraint/chokehold and holding down of one foot was not unreasonable. As to the use of a neck restraint/chokehold, the Court notes that the Tenth Circuit has previously found such use to be reasonable. Pride, 997 F.2d at 717.

Defendants, Susan Savage and Ron Palmer, also challenge Plaintiffs' 1983 claims. As the Court has found that Plaintiffs have failed to prove they were denied equal protection under the Fourteenth Amendment, Plaintiff, Deronn Wrather, has failed to prove she was subjected to the use excessive force in effectuating her arrest and Plaintiff, Stephen Williams, has failed to prove he was arrested without probable cause against the Tulsa police officers, the Court finds that these claims against Defendants, Susan Savage and Ron Palmer, as supervisors of these police officers also fail.[5]

In regard to the other § 1983 claims, the Court finds that Defendants, Susan Savage and Ron Palmer, are entitled to summary judgment. The Supreme Court has instructed that a person in a supervisory role cannot be held liable under § 1983 upon a theory

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[5] By definition, the predicate to supervisory liability is the existence of a constitutional violation. That is, a supervisor may be liable only if there is an "`affirmative link' between the constitutional violation and the supervisor's own actions or failure to supervise." Mee v. Ortega, 967 F.2d 423, 431 (10th Cir. 1992)(citing Meade v. Grubbs, 841 F.2d 1512, 1527 (10th Cir. 1988)).

of respondeat superior. See, City of Canton v. Harris, 489 U.S. 378, 385 (1989). In other words, to prevail on a 1983 claim, it is not sufficient for a plaintiff to show that a defendant was in charge of the actors who actually committed a violation. Just as with any individual defendant, the plaintiff must show a deliberate, intentional act by the supervisor to violate constitutional rights. Woodward v. City of Worland, 977 F.2d 1392, 1399 (10th Cir.), cert. denied, 509 U.S. 923 (1993). A plaintiff may satisfy this standard by showing personal direction of or actual knowledge and acquiescence of the violations. Id. at 1400 (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990).

The Court finds that Plaintiffs have failed to show personal participation and/or direction by Defendants, Susan Savage and Ron Palmer, in the alleged constitutional violations. Neither Defendant was present on scene during the alleged events. Indeed, Defendant, Ron Palmer, was out of town when the challenged events occurred.

In addition, the Court finds that Plaintiffs have failed to present sufficient evidence to establish that Defendant, Susan Savage, acquiesced in the alleged constitutional violations. The Supreme Court has held that a supervisor is not liable under § 1983 for constitutionally-proscribed misconduct by their subordinates unless the plaintiff demonstrates "[a]n affirmative link between the occurrence of the . . . misconduct and the adoption of any plan or policy--express or otherwise--showing [the supervisor's]

authorization or approval of such misconduct." Rizzo v. Goode, 423 U.S. 362, 371 (1976). Upon review of the record, the Court concludes that Plaintiffs have failed to present sufficient evidence to raise a genuine issue of fact as to whether Defendant, Susan Savage, adopted a plan or policy which authorized or approved of the alleged misconduct in this case. Plaintiffs assert that Defendant, Susan Savage, had established a policy of routing approximately 400 to 500 citizen complaints through the City of Tulsa's legal division, whose attorneys also represented the City and its employees, rather than having such complaints independently investigated and had also established a policy of not investigating citizens complaints of racial discrimination against Defendant, Ron Palmer. The Court, however, finds that even if such alleged policies did exist, they do not show an authorization or approval by Defendant, Susan Savage, of the remaining alleged constitutional violations in this case.

To the extent Plaintiffs attempt to argue that Defendant, Susan Savage, should be held liable because she stated in a letter to a constituent, Andrea Anderson, three days after the Ku Klux Klan rally, that the police officers acted appropriately and she testified in deposition that she was satisfied the situation was handled appropriately by the police officers, the Court finds that such action does not give rise to supervisory liability. Such action occurred days and months after the alleged constitutional violations by the police officers. In order to prevail under § 1983, a plaintiff must show that a defendant caused or contributed

to the alleged constitutional violation. Jenkins v. Wood, 81 F.3d 988, 944 (10th Cir. 1996). Clearly, the letter and/or the deposition testimony did not cause or contribute to the remaining alleged constitutional violations.

The Court further finds that Plaintiffs have failed to establish liability on the part of Defendant, Susan Savage, on the basis that she failed to intervene. The Tenth Circuit has ruled that in order to be liable under § 1983 based upon a failure to intervene, a person must have had an opportunity to intervene but failed to do so. Lusby, 749 F.2d at 1433. In this case, Plaintiffs have not shown that Defendant, Susan Savage, had an opportunity to intervene to stop the alleged unconstitutional acts. When the Tulsa police officers began dispersing the crowd, Defendant, Susan Savage, was on the eleventh floor of the Tulsa City Hall building, looking out her window. There is no evidence that from her location, she could have stopped the Tulsa police officers from allegedly dispersing peaceably assembled crowd and/or could have stopped the officers from allegedly arresting Plaintiffs without probable cause, or could have prevented Plaintiff, Stephen Williams, from allegedly being subjected to the use of excessive force. The Court, therefore, finds that Defendant, Susan Savage, is entitled to summary judgment on Plaintiffs' constitutional claims.

As to Defendant, Ron Palmer, Plaintiffs also seek to impose supervisory liability based upon certain policies he maintained. Plaintiffs contend that Defendant, Ron Palmer, approved for

distribution a written policy entitled Command Strategies and Control Tactics for Unusual Occurrences and Civil Disturbances, which delegated to the field commander the power to determine whether to disperse a relatively peaceful crowd in the event of an civil disorder and which permitted police officers to arrest those who failed to disperse. Plaintiffs contend that the police officers were acting pursuant to this policy when they forcefully removed Plaintiffs from the public sidewalk and such removal resulted in the violation of their constitutional rights. The Court, however, finds that Plaintiffs have failed to establish an affirmative link between the alleged misconduct and the written policy. The written policy does not authorize or approve of the dispersement of a crowd, which is relatively peaceful, unless there is a civil disorder. In this case, Plaintiffs maintain that the alleged misconduct of the police officers was removing Plaintiffs from the public sidewalk when they and other citizens were peaceably assembled and there was no violation of any ordinance or statute and there were no threats of violence. Under such alleged facts, the crowd's removal would not have been in accordance with Defendant, Ron Palmer's written policy. Therefore, the Court finds that Plaintiffs cannot establish that Defendant acquiesced in the alleged misconduct through the existence of the written policy.

Plaintiffs also claim that Defendant, Ron Palmer, maintained an unwritten policy that racial discrimination was acceptable and such policy authorized the alleged misconduct in this case. The Court, however, again finds that Plaintiffs have failed to

demonstrate an affirmative link between the alleged misconduct and the alleged policy. There is no evidence in the record that Plaintiffs, Vincent Turner and Deronn Wrather, were arrested without probable cause because of their race or that Plaintiff, Stephen Williams, was subjected to the alleged excessive force because of his race. There is also insufficient evidence to show that Plaintiffs and the other citizens were allegedly attacked by foot patrol officers, horse mounted officers and pepper gas because of their race. Plaintiffs allege that the police officers' reports demonstrate a racially-motivated justification for their actions. However, having reviewed the reports, the Court finds no mention of the citizens being removed because of their race or that race played any part in the police officers' actions. As previously discussed in regard to Plaintiff's equal protection claims, both black and white citizens were in the crowd and were subjected to the challenged attack. Therefore, the Court finds that Plaintiffs have failed to show an affirmative link between the alleged misconduct and the alleged unwritten policy of acceptance of racial discrimination by Defendant, Ron Palmer.

In addition, Plaintiffs seek to impose supervisory liability upon Defendant, Ron Palmer, on the ground that after viewing the Eckert #1 videotape, he testified in this case that the police officers acted appropriately. However, such testimony, occurring during this lawsuit, cannot result in supervisory liability under § 1983. Defendant, Ron Palmer's testimony did not in any way cause or contribute to the alleged unconstitutional acts. Jenkins, 81

F.3d at 944. There is no "affirmative link" or direct nexus between his testimony and the alleged misconduct.

Further, Plaintiff, Stephen Williams, seek to impose supervisory liability on the basis that Defendant, Ron Palmer, failed to train Defendant, Steven Middleton, in regard to the use of excessive force. Plaintiff contends that Defendant had prior knowledge of a complaint by a citizen that Defendant, Steven Middleton, broke down her door and that he had received a letter of reprimand for failing to maintain his temper and that he had two additional charges of excessive force which resulted in exoneration.

The inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. City of Canton, 489 U.S. at 388. Deliberate indifference exists when the supervisor has actual or constructive notice of a deficiency the training program and does nothing, or, in a narrow range of circumstances, when the supervisor fails to train an employee in specific skills needed to handle recurring situations that present an obvious potential for constitutional violations. Barney v. Pulsipher, 143 F.3d 1299, 1308 (10th Cir. 1998).

In the instant case, the Court finds that Plaintiff has failed to show that Defendant, Ron Palmer, acted with deliberate indifference to their constitutional rights. Although Plaintiff contends that Defendant had notice of a previous incident where

Defendant, Steven Middleton, broke down a door and had notice of two previous complaints of which Defendant, Steven Middleton, was exonerated, the Court concludes that the notice of such incidents does not establish actual or constructive notice that Defendant, Steven Middleton, would kick Plaintiff, Stephen Williams, and that there was a deficiency in his training in that regard. Therefore, the Court concludes that Defendant, Ron Palmer, may not be held liable under § 1983 for Plaintiff's excessive force claim based upon a failure to train.

Plaintiffs also seek to recover damages against the City of Tulsa under § 1983. As the Court has found that Plaintiffs have failed to prove a violation of their equal protection right under the Fourteenth Amendment, Plaintiff, Deronn Wrather, has failed to prove a violation of the right to be free from excessive force under the Fourth Amendment and Plaintiff, Stephen Williams, has failed to prove a violation of the right to be free from false arrest under the Fourth Amendment against the Tulsa police officers, the Court finds that these claims against Defendant, City of Tulsa, also fail. It is well-settled that a city may not be held liable absent a constitutional violation by its officers. Thompson v. City of Lawrence, 58 F.3d 1511, 1517 (10th Cir. 1995).

Turning to the remaining § 1983 claims, the Court notes that a city may be liable under § 1983 only for its own constitutional or illegal policies and not for the tortious acts of its employees. Monell v. Department of Soc. Servs., 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1978). The Supreme Court has

instructed that a municipality is liable only when an official policy is the "`moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and deprivation of federal rights." Board of County Comm'rs v. Brown, 520 U.S. 397, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

Only municipal officials, who have "final policymaking authority," by their actions may subject the municipality to § 1983 liability. City of St. Louis v. Praprotnik, 485 U.S. 112, 123, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). Nonetheless, the Supreme Court has identified two situations where a municipality may be found liable even though the action was by someone not a final policymaker. First, "egregious attempts by local governments to insulate themselves from liability for unconstitutional policies are precluded ... [if plaintiff proves] the existence of a widespread practice, that although not authorized by written law or express municipal policy, is so 'permanent and well settled as to constitute a "custom or usage" with the force of law." Praprotnik, 485 U.S. at 127. Second, when the municipality's authorized policymakers "approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." Id.

In the instant case, the Court finds that Plaintiffs have failed to establish the existence of a widespread practice constituting a custom or policy of Defendant, City of Tulsa, which

caused the alleged deprivation of Plaintiffs' constitutional rights. While Plaintiffs, as previously discussed, have alleged that Defendant, Susan Savage, established certain customs and policies regarding the handling of citizen complaints, Plaintiffs have failed to demonstrate that such alleged customs and policies were the "moving force" behind Plaintiffs' alleged injuries.

Although Plaintiffs have not established the existence of a custom or policy of the City of Tulsa which was the moving force behind Plaintiffs' alleged injuries, Plaintiffs nevertheless argue that Defendant, City of Tulsa, still remains liable for their § 1983 claims. Plaintiffs specifically contend that Defendant, Susan Savage, as the final policymaker for Defendant, City of Tulsa, ratified the alleged unconstitutional acts of the police officers by her May 9, 1996 letter to constituent, Andrea Anderson, and through her deposition testimony in this case, and therefore, such acts are chargeable to the City of Tulsa. As previously stated, if an authorized policymaker approves a subordinate's decision and the basis for it, her ratification will be chargeable to the municipality. Praprotnik, 485 U.S. at 127.

Defendant, City of Tulsa, responds that it may not be held liable under a ratification theory as Plaintiffs have not provided any evidence that Defendant, Susan Savage, ratified any of alleged unconstitutional acts of the police officers. Defendant asserts that it is undisputed that Defendant, Susan Savage, did not have all the information regarding the events at the time of her letter. Defendant asserts that there was no information in the police

reports reviewed by Defendant, Susan Savage, which would have indicated that a constitutional violation occurred. Furthermore, Defendant contends that there is no evidence that Defendant, Susan Savage, was aware of the basis for any of the officers' alleged unconstitutional acts.

Upon review, the Court concludes that Defendant, City of Tulsa, may not be held liable under § 1983 based upon any purported ratification by Defendant, Susan Savage, of the police officers' actions. As the record reveals, Defendant, Susan Savage's purported ratification occurred days and even years after the events alleged in this case. Plaintiffs have not cited to any authority which would impose municipality liability under § 1983 based upon a final policymaker's ratification of events days and years after their occurrence. As the Supreme Court has instructed, a plaintiff must demonstrate "a direct causal link between the municipal action and deprivation of federal rights." Board of County Comm'rs, 520 U.S. at 404; see also, City of Canton, 489 U.S. at 385.

In the Tenth Circuit cases which have addressed and applied the ratification theory, there was a direct causal link between the final policymaker's approval of an employee's action and the deprivation of a federal right. In those cases, the final policymaker had discussed with the employee the proposed action to be taken and was aware of the impermissible action and approved such action. See, e.g., Butcher v. City of McAlester, 956 F.2d 973, 977 (10th Cir. 1992)(employee made recommendations for

personnel actions which were approved by final policymaker; employee and final policymaker were in constant communication with each other and final policymaker aware of impermissible motives); Ware v. Unified School District No. 492, 902 F.2d 815 (10th Cir. 1990) (final policymaker knew employee's recommendation of personnel action was in retaliation for plaintiff's speech and approved recommendation); Melton v. City of Oklahoma City, 879 F.2d 706, 724 (10th Cir. 1989) (testimony indicated that the supervisor discussed the proposed dismissal of plaintiff with subordinate and approved such dismissal). However, in the instant case, there is no evidence that Defendant, Susan Savage, had discussed the proposed action to be taken by the individual police officers prior to the challenged acts. There is also no evidence in the record that she knew the alleged unconstitutional basis for the actions.

As previously stated, Plaintiffs assert that Defendant, Susan Savage, ratified the alleged unconstitutional acts of the police officers in her May 9, 1996 letter to Andrea Anderson. However, there is no evidence in the record that Defendant, Susan Savage, had any information which would have indicated that the alleged acts of the police officers were unconstitutional. There is also no evidence in the record which demonstrates that she adopted any alleged unconstitutional motives of the police officers. Butcher, 956 F.2d at 978 (ratification requires that the final policymaker know of and approve an employee's actions and adopt the employee's unconstitutional motive). The Court therefore concludes that Plaintiffs cannot show a direct causal link between Defendant,

Susan Savage's alleged ratification and the alleged deprivation of federal rights.

As to Defendant, Susan Savage's purported ratification during this lawsuit after viewing all of the evidence including the Eckert #1 videotape, the Court finds such ratification is not sufficiently established. Although Defendant, Susan Savage, after viewing the Eckert #1 videotape, testified that she did not see anything on the videotape which struck her as inappropriate, she also testified that if a formal complaint was received and investigated and determined that there was in fact problems, those police officers would be disciplined. Thus, the Court concludes that the record does not disclose that Defendant, Susan Savage, approved any alleged unconstitutional motives of the police officers, thereby making the alleged unconstitutional acts of the police officers chargeable to Defendant, City of Tulsa. Additionally, for the reasons previously stated in connection with the May 9, 1996 letter to Andrea Anderson, Plaintiffs have failed to establish the requisite direct causal link. Consequently, the Court finds that summary judgment is appropriate as to Plaintiffs' remaining § 1983 claims against Defendant, City of Tulsa.

Defendants contend that they are entitled to summary judgment on Plaintiffs' state law claims for assault and battery, intentional infliction of emotional distress and malicious prosecution. Defendants contend that the same arguments they have made in regard to their § 1983 claims applies with equal force to the state law claims. However, the Court, upon review, declines to

grant summary judgment on the state claims. Defendants have not properly shown that no genuine issues of fact apply as to these claims. Defendants have simply provided the Court with conclusory allegations that summary judgment is appropriate. The Court cannot determine from the summary judgment record whether Defendants are entitled to judgment as a matter of law on the state law claims.

Based upon the foregoing, Defendant Susan Savage's Motion for Summary Judgment (Docket Entry #105) is **GRANTED**; Defendant, Ron Palmer's Motion for Summary Judgment (Docket Entry #106) is **GRANTED**; Defendant, City of Tulsa's Motion for Summary Judgment (Docket Entry #109) is **GRANTED**; and Defendants, Bill Yelton, Michael Eckert, Charles Jordan, Steven Middleton, B. Bonham, Chris Witt, Sgt. Jim Clark, Major W.B. York, Corporal A. Wilson, and Kevin Johnson's Motion for Summary Judgment (Docket #107) is **GRANTED** in part and **DENIED** in part. Plaintiff's Motion to Strike Defendants' Reply Briefs (Docket Entry #138) is **DENIED** and Plaintiff's Opposed Application for Surreply (Docket Entry #137) is **GRANTED**.

ENTERED this 28th day of October, 1999.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TAYLOR SCOTT WOOD,

Plaintiff,

v.

VETERANS ADMINISTRATION, et al.,

Defendants.

Case No. 98-CV-0802-H (E)

REPORT AND RECOMMENDATION

On January 12, 1999, Defendants filed a Motion, and Brief in Support, to Dismiss All Claims Against Federal Defendants (hereinafter "Motion to Dismiss," Dkt. # 6). The matter was referred to the undersigned for a report and recommendation in accordance with her jurisdiction pursuant to the Federal Rules of Civil Procedure. For the reasons set forth below, the undersigned recommends that the motion be granted.

BACKGROUND

Although the claims in this matter are exceedingly unclear due to plaintiff's rambling, disjointed allegations, his primary complaints appear to be a low disability rating and inadequate medical care by the Veterans Administration (now the Department of Veterans Affairs) (VA) and delay, suspension, or termination of benefits by the Social Security Administration (SSA).[1] Plaintiff alleges that he has suffered a multitude of wrongs by administrative officials who have conspired to deprive him of constitutional rights and, in general, to make his life miserable. It appears from the

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[1] Plaintiff claims he is suing four individuals, two of whom work, or have worked, for the VA, and two of whom work for the SSA. It appears from the record that only two of these individuals have been properly served; nonetheless, the undersigned will address the merits of the case as to all four defendants because, as discussed below, the substance of plaintiff's complaint relates to the amount or timeliness of payments from the VA and the SSA.

record that plaintiff is extremely frustrated with what he perceives as a labyrinth of bureaucratic "red tape" created by conspirators at every turn. From this frustration, he attempts to craft a complaint worthy of a legal remedy.

Plaintiff appears *pro se* in this matter. He has submitted voluminous documentation, including annotated exhibits and annotated indices of exhibits, but he has not submitted complete copies of critical documents from the VA and SSA. Nonetheless, the following facts appear from a review of the record and an effort to piece together the factual basis for plaintiff's allegations:

Plaintiff was born on July 13, 1957. He was in the United States Air Force from April 1981-July 1982. His physical ailments began in August 1981 while he was playing softball. A runner ran into him, knocking him unconscious and breaking vertebrae in the cervical area of his spine. (Complaint, Dkt. # 1, Ex. 273)[2] He was placed in a cast, and then a collar for several months. As a result of the injury, he experienced frequent dizziness, decreased sensation in his chest, left shoulder, and left cheek, frequent headaches, sinus problems, hearing loss, and pain. He was taking classes in Russian at the Defense Language Institute at the time of the incident, and he claims that his grades were very good. After the incident, he began missing classes because of the pain associated with his injury, and he was honorably discharged. He then worked despite the pain from 1983 until 1990 as a bank teller, store manager, and an asbestos and hazardous material handler, instructor, and contractor. (Ex. 90, 98)

In late 1989 or early 1990 the pain became unbearable, and he visited the VA Medical Center in California. He saw several doctors, and x-rays were taken of his cervical spine, but he claims that some of the x-rays were lost, and the doctors who saw him were incompetent, inattentive, dishonest,

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[2] Unless otherwise noted, all exhibits referenced herein are exhibits attached to the Complaint.

or unscrupulous. Plaintiff requested disability benefits, and the VA assessed his disability at 10% in 1991. (Ex. 80, 592) As a result, he could not obtain financial assistance from other government agencies, including the Social Security Administration (SSA);[3] nor could he obtain the surgery he needed to repair or remove certain intervertebral discs. He asserts that he became homeless for some time. He appealed the VA's decision in November 1991. (Ex. 181)

Plaintiff moved temporarily to New York in January 1990 (Ex. 516, 517, 522, 528), and then to Cincinnati (Ex. 530, 534, 535, 538, 571) where he obtained medication and x-rays. He had other tests and x-rays performed in California from the summer of 1990 until December 1991 (Ex. 566, 567, 572, 582, 583, 173,) which indicated mild degenerative disc disease of the C6-7 area and other problems at the C5-6 area of plaintiff's spine. The SSA awarded plaintiff benefits in July 1992, when plaintiff was living in Hawaii. (Ex. 185)

Plaintiff tried to obtain medical treatment from the Army Medical Center and the VA clinic in Hawaii, but was turned away. (Ex. 272) He also applied to the state health insurance program, but was denied because he had insurance coverage by the VA. (Ex. 1250, 1252) Several doctors evaluated him in nonmilitary hospitals or clinics, and they recommended a neurosurgical consultation. He missed a hearing at the VA in Hawaii scheduled for March 18, 1992. (Ex. 195) He claimed that he was not properly informed of the hearing and requested to be heard before a Board of Veterans' Appeals ("BVA") in September 1992. (Ex. 196) The hearing was rescheduled for February 1993 when the BVA changed its travel plans, and then it was postponed indefinitely. (Ex. 192)

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[3] His applications for benefits from the SSA and the State of California Health and Welfare Agency Department of Social Services were denied in 1991. (Exs. 367, 369) However, plaintiff was able to obtain food stamps. (Ex. 100)

Plaintiff relocated to Massachusetts and filed a statement in support of his appeal to the BVA in October 1993. (Ex. 201) However, he waived his right to be heard at a hearing set for November 1993. (Ex. 172) The BVA remanded plaintiff's case in 1995 for further development, indicating that the VA failed to submit a statement of the case. (Ex. 808) Plaintiff claims that defendant Alibrando is responsible for this decision which effectively denied him access to the courts. (Ex. 46 at 4.)

In 1997, the SSA office in Massachusetts notified claimant that the SSA had determined that he was no longer disabled as of April 1, 1997, and his disability benefits would cease in June 1997. The SSA indicated, in a contradictory manner, that his medical condition had improved but that he had not cooperated with the Continuing Disability Review process, and it was unable to assess the current severity of his impairment. (Ex. 740) Apparently, plaintiff did not receive the letter because he had moved to Indianapolis, and the SSA notice was re-sent to him, at an address in Indianapolis, in August 1997. (Ex. 743) Although an emergency check was issued to him, he failed to receive it when he was staying at a shelter. He claims that people who worked at the shelter, administration officials, and the U.S. Postal Service are at fault. (Ex. 779)[4]

From what the undersigned is able to discern from plaintiff's allegations, he attempted to file a timely appeal of the SSA's cessation of his checks, and to personally serve SSA officials at the Indianapolis SSA office. However, according to plaintiff, defendant Irwin refused to acknowledge his timely filing, and she called security agents to oust plaintiff from the building. (See Ex. 4 at 34-36, Ex. 46 at 3, Ex. 701.) Further, plaintiff received a letter from the Jamaica, New York, SSA office indicating that he owed the SSA reimbursement for overpayment of benefits. (Ex. 652)

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[4] The record indicates that plaintiff had previously failed to receive benefit checks from the VA when he moved from Hawaii to Massachusetts, and from Massachusetts to Indiana. (Exs. 786, 784, 783)

Plaintiff relocated to Oklahoma in late 1997. He sent a heavily annotated form letter to the Tulsa SSA office in November or December 1997, in which he challenges the cessation of his disability payments in September 1997. (Ex. 659) Plaintiff also accuses the SSA of continuing to make deductions for Medicare premiums from the disability checks he received until October 1996, even though he was no longer entitled to Medicare during that time period. (Ex. 659) A "critical" payment check was approved on December 9, 1997, but he had not received it by December 15, 1997. (Ex. 657) He requested a hearing before an SSA administrative law judge. The record indicates that he is currently receiving Social Security benefits in Oklahoma. (Ex. 644) He claims that defendant Dalrymple denied him access to medical reports and failed to enter a hearing postponement notice. (Complaint, at 1B.)

Plaintiff has entitled his pleading "Civil Rights Conspiracy Complaint" and named as defendants a former secretary of the VA, an associate counsel to the BVA, an official in the Indianapolis SSA office, and an official in the Tulsa SSA office. His claim against the former secretary of the VA is based on the secretary's statements to the press regarding homeless veterans and newly disabled veterans. (Resp. Br. at 10) He brings his claims pursuant to "42 U.S.C. § 1985; 28 U.S.C. § 1343, § 1331; 18 U.S.C. § 1961, § 241; 42 U.S.C. § 1986; 28 U.S.C. § 1331, § 1391, § 1361; 42 U.S.C. § 1983.[5] (Complaint) These provisions relate to "Civil action for deprivation of rights" (42 U.S.C. § 1983); "Conspiracy to interfere with rights" (42 U.S.C. § 1985); "Action for neglect to prevent" (42 U.S.C. § 1986); "Federal question" jurisdiction (28 U.S.C. § 1331); "Civil

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[5] Plaintiff amended the title page to indicate that his complaint is brought "pursuant to 42 U.S.C. § 1985; 28 U.S.C. § 1343; 18 U.S.C. § 241 (§ 1961, § 1964); 42 U.S.C. § 1986; per 18 U.S.C. §1512, § 1509, § 401, § 1505, § 1503, § 1510, § 1518, § 1505, § 1506, § 2071, § 1001, § 1018; submitted." (Answer to the Motion to Dismiss, (hereinafter "Resp. Br."), Dkt. # 9)

rights and elective franchise" jurisdiction (28 U.S.C. § 1343); "Action to compel an officer of the United States to perform his duty (28 U.S.C. § 1961); "Venue generally" (28 U.S.C. § 1391); "Conspiracy against rights" (18 U.S.C. § 241); "Definitions" under the Racketeer Influenced and Corrupt Organizations (RICO) statute (18 U.S.C. § 1961); and"Civil remedies" for violations of RICO (18 U.S.C. § 1964). His additional references to provisions in title 18 of the United States Code involve a variety of criminal statutes dealing with the contempt power of the court, fraud and false statements, obstruction of justice, and concealment, removal, or mutilation of official records or reports.

In essence, plaintiff purports to challenge the policies and procedures of the VA relating to medical services for veterans, and the policies and procedures of the SSA relating to benefits for the disabled. He states that this case is "about multiple counts of obstruction of justice (evasion, corruptly influencing, tampering, alteration of record, retaliation, etc...)" and "ultimately about violations and deprivations of USCA Const. Amend. 14 due process clause, access to courts and proceedings, deprivations of materials necessary to afford reasonable access to courts and proceedings, and violations & deprivations of having a right, privilege or immunity as a citizen of the United States of America." (Resp. Br., at 1.)

Plaintiff requests relief in the form of compensatory and exemplary damages, court fees and costs, and preliminary injunctive relief, claiming that the amount in controversy exceeds $4,555,000. (Complaint, at 5.) Plaintiff is requesting $1,500,000 for medical care; $2,000,000 for all future medical care; $21,000 per annum in lost wages until the year 2005 ($333,000 if his condition is correctable, and $690,000 if it is not); $750,000 exemplary damages for pain and suffering, emotional

distress and defamation; and all fees and costs. (Resp. Br. at 6-7.) He asserts that this Court has pendent subject matter jurisdiction. (Resp. Br. at 2.)

Defendants' Motion to Dismiss (Dkt. # 6) is based on the following four arguments: (1) plaintiff's complaint violates Rule 8(a) of the Federal Rules of Civil Procedure and fails to state a claim upon which relief can be granted; (2) plaintiff failed to properly state a basis of jurisdiction; (3) plaintiff failed to properly serve the federal defendants pursuant to Fed. R. Civ. P. 4; and (4) plaintiff's complaint is "frivolous" and should be dismissed pursuant to 28 U.S.C. § 1915(d). In their reply brief, defendants argue that plaintiff has no civil rights claim under 42 U.S.C. § 1985. Defendants correctly point out that the mandatory review process for a decision by the VA is an appeal to the BVA, then to the Court of Appeals for Veterans Claims, and then to the Court of Appeals for the Federal Circuit.

REVIEW

Plaintiff's claims fail primarily because the Court does not have jurisdiction. Plaintiff has loosely alleged conspiracy, civil rights violations, due process violations, and obstruction of justice by reference to a plethora of statutes, but the core of plaintiff's complaint is his dissatisfaction with his 10% disability rating by the VA, and the problems he has encountered in obtaining Social Security benefits. There are administrative procedures to deal with each of these claims, and claimant has not exhausted his remedies in the appropriate administrative contexts. He has applied for, and receives, benefits from both agencies, but he has not properly pursued his appeal rights in either agency to resolution. Although *pro se* petitions must be read liberally, Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing Haines v. Kerner, 404 U.S. 519, 520 (1972)), plaintiff cannot circumvent proper administrative procedures by invoking civil rights, conspiracy statutes, constitutional

violations, or criminal laws relating to obstruction of justice in an effort to obtain federal jurisdiction over claims that could not otherwise be heard.

VA Claim

Plaintiff indicates that the appeal of his VA disability rating was remanded by the BVA, but he does not indicate the status of his case on remand. He blames the BVA associate counsel for the remand, but there is no indication that the associate counsel had any part in making that decision. Even if he did, there is no basis for liability. If the BVA record is inadequate, remand to the Department of Veterans' Affairs is required. See Sokowski v. Derwinski, 2 Vet App. 75, 77 (1991); Meister v. Derwinski, 1 Vet. App. 472, 473 (1991).

The record does not contain complete documentation regarding plaintiffs' appeal. Plaintiff submitted the third page from a "Statement of the Case" which sets forth some medical findings, the fact that plaintiff's notice of disagreement and contentions was received on January 9, 1991, and some information about the pertinent laws, regulations, and rating schedule provisions. (Resp. Br., Ex. 344) He also submitted a single page from a "Supplemental Statement of the Case" discussing some of the rationale in support of the VA's denial of plaintiff's request to increase his disability rating. (Resp. Br., Ex 242) A letter, dated May 24, 1991, indicates that the VA planned to submit the Supplemental Statement of the Case to the BVA after providing plaintiff with an opportunity to comment on the document. (Resp. Br., at 238)

Apparently, the BVA never received the statement of the case, or the statement of the case was insufficient, and it remanded the claim. The undersigned was unable to find a complete copy of the BVA remand in the file. Plaintiff submitted what appears to be the first and last pages of the remand with his response brief. The first page indicates, in the "Introduction," that claimant's desire

to appeal certain issues was not clear because no statement of the case had been furnished, and the matter would be referred to the VA Regional Office for further clarification and appropriate action. (Resp. Br. Ex. 245) The last page indicates that the remand is a preliminary order and cannot be appealed to the Court of Veterans Appeals. (Resp. Br., Ex. 252) Plaintiff claims that this statement leaves him in "limbo" without access to the courts. (See Resp. Br. Index, at 17)[6]

After the remand, the VA sent a letter to plaintiff informing him of the remand and requesting additional information, including a list of all health care providers who treated him for his neck condition since July 1990. (Resp. Br., at Ex. 455) The record does not indicate whether plaintiff responded to the VA's request, nor does it indicate whether the BVA ever revisited the matter.[7] Regardless, the Court of Veterans Appeals (now the Court of Appeals for Veterans Claims) has exclusive jurisdiction of BVA decisions, and the Court of Appeals for the Federal Circuit has exclusive jurisdiction of decisions by the Court of Appeals for Veterans Claims. 38 U.S.C. §§ 7252, 7292. The United States District Court for the Northern District of Oklahoma is not the proper forum for plaintiff to bring his claim for VA disability benefits.

Defendants have cited two Tenth Circuit opinions directly on point. In Burkins v. United States, 112 F.3d 444 (10th Cir. 1997), the court wrote: "In order to receive disability benefits, a veteran must first file a claim with the V.A. 38 U.S.C. § 5101. If the veteran's claim is denied, the

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[6] He also claims that the VA has "raised overbroad prohibitions against attorney representation of veterans." (Resp. Br. at 10; see also Resp. Br. Index, at 17, referencing Ex. 253) The undersigned views this allegation as meritless, in light of the extensive provisions set forth in 38 U.S.C. § 5901 *et seq.* regarding attorney representation of veterans before the VA.

[7] If plaintiff believes that VA or BVA inaction is responsible for unreasonable delays in the process, he can petition the Court of Appeals for Veterans Claims for equitable relief pursuant to 38 U.S.C. § 7521(a)(2) or the All Writs Act, 28 U.S.C. § 1651(a). Beamon v. Brown, 125 F.3d 965, 968-69 (6th Cir. 1997); Dacoron v. Brown, 4 Vet App. 115, 119 (1993)

veteran may seek review from the Board of Veterans' Appeals, then the Court of Veterans Appeals, and finally the Federal Circuit." Id. at 447. Where the substance of a complaint seeks corrective review of actions taken in denial or handling of veterans' benefits, dismissal is appropriate despite complaints of conspiracy, fraud, and misrepresentation against individual VA officials. Weaver v. United States, 98 F.3d 518, 520 (10th Cir. 1996). The Weaver court emphasized: "We examined the substance of [plaintiff's] allegations, rather than the plaintiff's labels, to determine their true nature." Id. (citation omitted).

Other jurisdictions are in accord. See, e.g., Beamon v. Brown, 125 F.3d 965, 971-74 (6th Cir. 1997) (district court does not have subject matter jurisdiction over veterans' claim that VA procedures for processing claims unreasonably delayed benefits decision in violation of their due process rights; Court of Veterans Appeals has exclusive jurisdiction); Zuspann v. Brown, 60 F.3d 1156, 1158-60 (5th Cir. 1995) (district court lacked subject matter jurisdiction over veteran's claim that VA Secretary and VA physician, among others, denied him adequate medical care and due process because his claim was, in reality, an individualized challenge to the VA's decision to deny him benefits); Sugrue v. Derwinski, 26 F.3d 8, 11 (2d Cir. 1994) (veteran's claim against VA was a challenge of the denial of his requested level of benefits based upon a disputed disability rating, over which the district court lacked subject matter jurisdiction, despite the veteran's attempts to cloak his challenge in constitutional terms under the Fifth Amendment, or to use the Privacy Act or Freedom of Information Act as rhetorical cover for his attack on VA benefits determinations); Hicks v. Veterans Administration, 961 F.2d 1367, 1369-70 (8th Cir. 1992) (even constitutional challenges are included within the exclusive statutory scheme for review of veterans' disability benefits claims, as long as such claims are necessary to a decision which affects the provision of VA benefits); Tietjen

v. United States Veterans Administration, 884 F.2d 514, 515 (9th Cir. 1989) (VA's reduction of veteran's disability was not subject to judicial review, where the substance of his action challenged decisions of law or fact concerning the administration of benefits, rather than the constitutionality of benefits legislation). Plaintiff's claim for VA benefits should be dismissed for lack of subject matter jurisdiction.

SSA Claim

Plaintiff's argument with regard to his Social Security benefits is twofold: delayed payments caused him to lose his apartment when he lived in Indianapolis; and he was not afforded a hearing on his claim in Tulsa. It is not clear whether he was told that the hearing would be rescheduled and it was not, or whether he refused to participate in a hearing. Both of these points are moot, however, because he has been receiving Social Security benefits since September 1992, for a disability period beginning November 1990. (Motion to Dismiss, Ex. A; Resp. Br. at 72.)

Presumably, he requested the hearing in Tulsa to complain about the treatment he received from SSA officials in Indianapolis. However, a delay in benefit payments is not actionable. See Schweiker v. Chilicky, 487 U.S. 412 (1988). In Schweiker, claimants were individuals whose social security disability benefits were improperly terminated under a continuing disability review program, but later restored. They sought declaratory and injunctive relieve and money damages for emotional distress resulting from loss of food, shelter, and other necessities. Id. at 417-19. The Supreme Court ruled that an improper denial of disability benefits, allegedly resulting from due process violations in the administration of continuing disability review program, did not give rise to claims for money damages against federal and state government officials who administered the program. Id. at 424.

Plaintiff's claim that he was injured by a delay in benefits or lack of a hearing before the SSA should be dismissed for failure to state a claim.

RECOMMENDATION

Based upon the foregoing, the undersigned recommends that the Motion, and Brief in Support, to Dismiss All Claims Against Federal Defendants (Dkt. # 6) be granted.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1); and § 2254, Rules 8, 10; see also Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See Thomas v. Arn, 474 U.S. 140 (1985); Haney v. Addison, 175 F.3d 1217 (10th Cir. 1999).

DATED this 28th day of October, 1999.

Claire V. Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 28th Day of October, 1999.

L. Lardelle, Deputy Clerk

FILED

OCT 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 99CV0726C(E)
	)	
GRADY E. ANDERSON,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE OCT [illegible] 1999

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Phil Pinnell, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 28th day of October, 1999.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Phil Pinnell

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of October, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Grady E. Anderson, 2613 W. Haskell Pl., Tulsa, OK 74127.

Libbi L. Felty

Libbi L. Felty
Paralegal Specialist

MT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 99CV0590B(M)
	)	
SANDRA K. MORRISON,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE OCT 28 1999

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Phil Pinnell, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 28th day of October, 1999.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of October, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Sandra K. Morrison, 310 3rd NE, Apt. #2, Miami, OK 74354.

Libbi L. Felty
Paralegal Specialist

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CJ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD MAYNOR BLACKSTOCK, ex rel. The People of Oklahoma,

Petitioner,

vs.

KYLE B. HASKINS, dba District Court Judge of Tulsa County; THOMAS GILLERT, dba District Court Judge of Tulsa County; CHARLES CRANDELL, dba Warden of Corrections Corporation of America,

Respondents.

ENTERED ON DOCKET

DATE OCT 28 1999

Case No. 99-CV-876-K (E)

ORDER

On October 18, 1999, Petitioner, appearing *pro se*, filed a petition for writ of habeas corpus (#1), a request for immediate hearing on his petition (#2) and three separate affidavits, each entitled "Affidavit of Criminal Charges by Witness or Victim of Criminal Activity," submitted by affiants Richard Maynor Blackstock, Polly Blackstock, and James Pruitt. Petitioner paid the filing fee to commence this action. Petitioner has also commenced a separate civil action in this Court. See Case No. 99-CV-875-H. Based on the petition filed in this case and the attachments to the complaint filed in Case No. 99-CV-875-H, the Court has determined that Petitioner is a pretrial detainee in custody at the Tulsa County Jail. Consistent with his *pro se* status, the Court liberally construes this petition as a petition for pretrial habeas corpus relief filed pursuant to 28 U.S.C. § 2241. See Haines v. Kerner, 404 U.S. 519 (1972).

The Supreme Court has established that "federal habeas corpus does not lie, absent 'special

circumstances,' to adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court." Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 489 (1973) (citing Ex parte Royall, 117 U.S. 241, 253 (1886)). To allow otherwise would permit the "derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court." Id. at 493.

The attachments to the complaint filed in Case No. 99-CV-875-H indicate that Petitioner is presently held in Tulsa County Jail on charges of Driving Without a Driver's License, Driving Without Owners' Security Verification Form, and Taxes Due State, all filed in Tulsa County District Court, Case No. TR-99-12014. In the instant petition, Petitioner requests the following:

> [that the Court] set an immediate hearing before a judge, and allow BLACKSTOCK RICHARD M to call witnesses, and Defendants, and Order the Defendants to appear with prisoner BLACKSKTOCK (sic) RICHARD M., hereinafter Relator, and at this aforesaid hearing, set certain by the Court, to show cause why Relator should not be discharged forthwith. The intent and purpose of this hearing is to inquire into why Defendants are incarcerating, holding and restraining Relator's liberty, without claim (jurisdiction), by way of an alleged $15,000 cash ransom and involuntary servitude.

(#1 at 1). In his Affidavit, Petitioner alleges the September 7, 1999 traffic stop was effected without probable cause and that he is "illegally and unlawfully incarcerated without probable cause . . . ." In his prayer for relief, Petitioner requests that this Court "completely discharge [Petitioner] from the illegal and unlawful restraint of liberty by the Defendants and restore [Petitioner's] freedom." (#1 at 3). Thus, it is clear that as his remedy, Petitioner seeks dismissal of the charges against him or to otherwise prevent the State of Oklahoma from prosecuting the charges. As a result, habeas corpus relief must be denied because pretrial habeas corpus is not available to prevent a prosecution in state court. See Capps v. Sullivan, 13 F.3d 350, 353 (10th Cir. 1993).

The Court concludes that pretrial habeas corpus relief does not lie in this case. Petitioner must afford the courts of the State of Oklahoma the opportunity to consider and correct any violations of the Constitution by raising these issues at trial and, if convicted, on direct appeal.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 is **denied.**

2. Petitioner's request for an immediate hearing (#2) is **denied.**

SO ORDERED THIS 26 day of October, 1999.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 27 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHRISTOPHER C. WREN;
NEIGHBORHOOD HOUSING SERVICES OF AMERICA, INC.;
COUNTY TREASURER, Tulsa County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET
DATE OCT 28 1999

CIVIL ACTION NO. 95-C-0095-BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 27 day of Oct, 1999. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, Neighborhood Housing Services of America, Inc., appears by its attorney H. Gregory Maddux; and the Defendant, Christopher C. Wren, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, Christopher C. Wren, was served with Summons and

Complaint on March 27, 1995; that the Defendant, Neighborhood Housing Services of America, Inc., executed a Waiver of Service of Summons on February 28, 1995; that the Defendant, County Treasurer, Tulsa County, Oklahoma, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on January 31, 1995; and that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on January 31, 1995.

It appears that Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on February 9, 1995; that Defendant, Neighborhood Housing Services of America, Inc., filed its Answer on April 4, 1995; and that Defendant, Christopher C. Wren, has failed to answer and his default has therefore been entered by the Clerk of this Court.

The Court further finds that on May 11, 1995, Christopher Wren filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 95-01372-R. That case was dismissed on September 12, 1997, as evidenced by the Order Dismissing Case filed on that date. Subsequently, Case No. 95-01372-R, United States Bankruptcy Court for the Northern District of Oklahoma, was closed on January 23, 1998.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following

described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Three (3), Block Four (4), POUDER AND POMEROY ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on August 14, 1985, Ronald D. Horn and Sharisse Horn executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of $31,000.00, payable in monthly installments, with interest thereon at the rate of 11.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Ronald D. Horn and Sharisse Horn executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated August 14, 1985, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on August 14, 1985, in Book 4884, Page 1282, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Christopher C. Wren, currently holds the fee simple title to the property via mesne conveyances.

The Court further finds that the Defendant, Christopher C. Wren, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Christopher C. Wren, is indebted to the Plaintiff in the

principal sum of $27,864.17, plus administrative charges in the amount of $425.00, plus penalty charges in the amount of $71.20, plus accrued interest in the amount of $1,419.71 as of October 19, 1994, plus interest accruing thereafter at the rate of 11.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, Christopher C. Wren, is in default and therefore has no right, title or interest in the subject real property.

The Court further finds that the Defendant, Neighborhood Housing Services of America, Inc., has a lien against the property which is the subject matter of this action by virtue of an Assignment of Mortgage, dated June 7, 1988, and recorded on June 15, 1988, in Book 5107, Page 1189 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has liens on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $51.00 (1991 - $19.00; 1992 - $16.00; and 1993 - $16.00). Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against the Defendant, Christopher C. Wren, in the principal sum of $27,864.17, plus administrative charges in the amount of $425.00, plus penalty charges in the amount of $71.20, plus accrued interest in the amount of $1,419.71 as of October 19, 1994, plus interest accruing thereafter at the rate of 11.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Neighborhood Housing Services of America, Inc., have and recover judgment in the amount due and owing on an Assignment of Mortgage, dated June 7, 1988, and recorded on June 15, 1988, in Book 5107, Page 1189 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $51.00 (1991 - $19.00; 1992 - $16.00; and 1993 - $16.00), plus penalties and interest, for personal property taxes, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Christopher C. Wren and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Christopher C. Wren, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;
Second:
In payment of the judgment rendered herein in favor of the Plaintiff;
Third:
In payment of the judgment rendered herein in favor of the Defendant, Neighborhood Housing Services of America, Inc.;
Fourth:
In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since

the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

DICK A. BLAKELEY, OBA #0852
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Attorney for County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 95-C-0095-BU (Wren)

WDB:css

H. GREGORY MADDUX, OBA #10582
525 South Main, Suite 1120
Tulsa, Oklahoma 74103
(918) 748-8987
Attorney for Defendant,
Neighborhood Housing Services of America, Inc.

Judgment of Foreclosure
Case No. 95-C-0095-BU (Wren)

WDB:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE CECENA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 98-C-959-B(J)
	)	
GEAR PRODUCTS, INC.,	)	
	)	
Defendant.	)	

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Gear Products Inc., and against the Plaintiff, George Cecena. Plaintiff shall take nothing on his claim. Costs are assessed against the Plaintiff upon timely application pursuant to N. D. LR 54.1, and each party is to pay its respective attorney's fees.

Dated this 26th day of October, 1999.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Secretary of Veterans Affairs, Plaintiff, v. DONALD HOLMAN; ROCHELLE HOLMAN; CITY OF TULSA, OKLAHOMA; HILLCREST MEDICAL CENTER; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	ENTERED ON DOCKET DATE OCT 27 1999 FILED OCT 26 1999 Phil Lombardi, Clerk U.S. DISTRICT COURT CIVIL ACTION NO. 99-CV-0201-B (J)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 26th day of Oct., 1999. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; that the Defendant, City of Tulsa, Oklahoma, appears by its attorney Alan L. Jackere; that the Defendant, Hillcrest Medical Center, appears by its attorney Daniel M. Webb; and the Defendants, Donald Holman and Rochelle Holman, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Donald Holman, executed a Waiver of Service of Summons on June 3, 1999; that the Defendant, Rochelle Holman, executed a Waiver of Service of Summons on June 2, 1999; that

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the Defendant, Hillcrest Medical Center, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on March 17, 1999.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on April 22, 1999; that the Defendant, City of Tulsa, Oklahoma, filed its Answer on April 16, 1999; that the Defendant, Hillcrest Medical Center, filed its Answer on or about April 12, 1999; and that the Defendants, Donald Holman and Rochelle Holman, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain promissory note and for foreclosure of a mortgage upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot 21, Block 19, VALLEY VIEW ACRES ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on July 26, 1973, the Defendants, Donald Holman and Rochelle Holman, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of $9,500.00, payable in monthly installments, with interest thereon at the rate of 4.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Donald Holman and Rochelle Holman, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated July 26, 1973, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on July 30, 1973, in Book 4080, Page 1792, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 24, 1992, Rochelle Holman filed her voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Central District of California, Case No. LA92-84037-GM. The above-described property was made a part of the bankruptcy estate as shown on Schedule A of the bankruptcy schedules. On December 29, 1994, a Notice of Dismissal was entered in this case, and an Order closing the case was entered on January 6, 1995.

The Court further finds that on March 26, 1996, Donald Holman and Rochelle Holman filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Central District of California, Case No. SA96-13295-LR. The above-described property was made a part of the bankruptcy estate as shown on Schedule A of the bankruptcy schedules. On July 22, 1996, debtors were discharged of all dischargeable debts. An Order closing the case was entered on April 22, 1998.

The Court further finds that the Defendants, Donald Holman and Rochelle Holman, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of $4,395.53, plus administrative charges in the amount of $618.00, plus penalty charges in the amount of $16.64, plus accrued interest in the amount of $1,319.58 as of April 23, 1998, plus interest accruing thereafter at the rate of 4.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $10.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, City of Tulsa, Oklahoma, has liens on the property which is the subject matter of this action in the total amount of $491.00 plus interest, by virtue of recorded liens on the property as reflected in book 5983 at page 0611 and in book

6062 at page 1781 of the records of the County Clerk for Tulsa County, Oklahoma. Said liens are superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Hillcrest Medical Center, has a lien on the property which is the subject matter of this action by virtue of an Affidavit of Judgment, dated June 5, 1990, and filed on June 6, 1990, in District Court, Tulsa County, State of Oklahoma, Case No. CS-90-01446; and by virtue of an Execution dated May 17, 1995, and recorded on May 19, 1995, in Book 5714, Page 1180 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of 1997 cleaning and mowing taxes in the total amount of $501.00, plus penalties and interest. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, Donald Holman and Rochelle Holman, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that Plaintiff further states that the Internal Revenue Service has liens upon the property by virtue of a Notice of Federal Tax Lien dated December 12, 1984, and recorded on December 17, 1984, in Book 4834, Page 134 in the records of the Tulsa County Clerk, Tulsa County, Oklahoma; by virtue of a Notice of Federal Tax Lien dated May 7, 1991, and recorded on May 14, 1991, in Book 5321, Page 0769 in the records of the Tulsa County Clerk, Tulsa County, Oklahoma; by virtue of a Revocation of Certificate of Release of Federal Tax Lien dated June 13, 1991, and recorded on July 2, 1991, in Book 5332, Page 1752 in the records of the Tulsa County Clerk, Tulsa County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Internal Revenue Service is

not made a party hereto; however, by agreement of the agencies the liens will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Secretary of Veterans Affairs.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against Defendants, Donald Holman and Rochelle Holman, in the principal sum of $ 4,395.53, plus administrative charges in the amount of $618.00, plus penalty charges in the amount of $16.64, plus accrued interest in the amount of $1,319.58 as of April 23, 1998, plus interest accruing thereafter at the rate of 4.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.41% percent per annum until fully paid, plus the costs of this action in the amount of $10.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, City of Tulsa, Oklahoma, have and recover judgment in the amount of $491.00 plus interest by virtue of recorded liens on the property as reflected in book 5983 at page 0611 and in book 6062 at page 1781 of the records of the County Clerk for Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Hillcrest Medical Center, have and recover judgment in an amount owing on an Affidavit of Judgment, dated June 5, 1990, and filed on June 6, 1990, in District Court, Tulsa County, State of Oklahoma, Case No. CS-90-01446 and an Execution dated May 17, 1995, and recorded on May 19, 1995, in Book 5714, Page 1180 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $501.00, plus penalties and interest, by virtue of 1997 cleaning and mowing taxes.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Donald Holman, Rochelle Holman, and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Defendant, City of Tulsa, Oklahoma;

Third:
In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma;

Fourth:
In payment of the judgment rendered herein in favor of the Plaintiff;

Fifth:
In payment of the judgment rendered herein in favor of the Defendant, Hillcrest Medical Center.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and

decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

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Judgment of Foreclosure
Case No. 99-CV-0201-B (J) (Holman)

PB:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE CECENA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 98-C-959-B(J)
	)	
GEAR PRODUCTS, INC.,	)	
	)	
Defendant.	)	

ORDER

Before the Court for decision is Defendant's Motion For Summary Judgment (Docket #12) and the Court, being fully advised, finds as follows:

Background

Plaintiff brought this action originally alleging that during his employment with Defendant he was the victim of harassment based upon his race and national origin under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981. Plaintiff withdrew his claim of racial harassment at the scheduling conference. He now proceeds on claims of hostile work environment, constructive discharge and negligent supervision.

Defendant asserts there were a few sporadic comments which, although

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inappropriate, are not actionable conduct under Title VII or §1981. Further, Defendant argues that Plaintiff offers no evidence to indicate the terms and conditions of his employment suffered as a result of these comments.

Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

Undisputed Material Facts

Plaintiff does not dispute the material facts offered in support of summary judgment but states the facts as presented provide an incomplete picture.[1] Plaintiff submits additional facts he states require the Court to deny summary judgment. The undisputed facts conceded by Plaintiff are:[2]

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[1]Defendant correctly asserts that Plaintiff has failed to comply with N.D. LR 56.1(B), however the effect of noncompliance is for the Court to deem Defendant's material facts admitted. As Plaintiff concedes those facts, this need not be addressed by the Court.

[2]Where supported by the record, Plaintiff's facts are added in italics with editing by the Court where necessary to accurately reflect the record.

1. Plaintiff began working for Defendant on or about August 28, 1995 as a shop helper on the third shift. Initially, Plaintiff was hired as a temporary employee and was paid a salary of six dollars and fifty cents ($6.50) per hour.

2. Plaintiff alleges that during his initial interview, his immediate supervisor Brian Schrum ("Schrum"), informed him that if he had any problems during his employment, *like people calling him names*, to "go to him [Schrum] and he would take care of it." Plaintiff stated Schrum was fair to him during the interview and that he wanted to work for Defendant.

3. Schrum was Plaintiff's immediate supervisor throughout Plaintiff's employment.

4. When Plaintiff became a full-time employee of Defendant, he received a pay increase of fifty cents (.50), to seven dollars ($7.00) an hour. Shortly thereafter, Plaintiff was transferred to day shift and received another salary increase.[3]

5. Plaintiff received periodic pay increases throughout his employment with Defendant.

6. Throughout Plaintiff's employment with Defendant, he had attendance problems which were documented and reported to him on a periodic basis. Plaintiff conceded at his deposition that he was reprimanded on more than one occasion for his absences.

7. Plaintiff alleges that while he was working on the third shift, a coworker called

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[3]Exhibit "B" to Defendant's motion establishes April 1, 1996 as the effective date Plaintiff began working the first shift.

him a "tree-trimmer," somehow linking that comment to his national origin. However, Plaintiff never informed Schrum or any other member of Defendant's management of this remark.

8. Plaintiff testified at his deposition that he had never heard the phrase "tree trimmer" and that his coworker referred to him by that only one time.

9. After Plaintiff began working on the first shift *on April 1, 1996*, Plaintiff testified that a coworker referred to him as "Julio" and "Carlos." According to Plaintiff, before he could report these remarks, Schrum referred to him by the name "Julio."[4] *Plaintiff also asserts there was a prior incident in which Schrum's brother, who also worked for Defendant, called Plaintiff "Hector," and Schrum did nothing in response to Plaintiff's complaint regarding this.*

10. Plaintiff confirms that on May 16, 1997, Schrum, at the direction of Defendant's President, conducted an anti-harassment meeting and training with Plaintiff and the other employees he supervised. *The meeting was called following receipt of a racial letter by an African-American coworker. No reference was made to Plaintiff's complaints during the meeting. Plaintiff believed anyone who said anything racial or sexual following the meeting would be terminated immediately.*

11. At all times during Plaintiff's employment, Defendant had a written anti-harassment policy which expressly states:

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[4]It appears Plaintiff decided at that point that it was futile to complain.

> "Any employee who believes that the actions or words of a supervisor or fellow employee constitutes unwelcome harassment has a responsibility to report a complaint as soon as possible to the appropriate supervisor or the Human Resource Manager, if the complaint involves the supervisor."

12. During Plaintiff's employment, the Human Resources Manager for Defendant was Robert McCormac ("McCormac"). Plaintiff testified that he never discussed any of his complaints of alleged harassment with McCormac.

13. Plaintiff alleges that *immediately* after the anti-harassment training, he overheard a coworker, Paul Loftis ("Loftis"), refer to him as "burrito" *in the context of indicating the company would have no problems if Plaintiff and "the Nigger" weren't there.* After hearing the comment, Plaintiff reported the incident to Schrum.

14. In response to the complaint made by Plaintiff, Schrum disciplined Loftis and placed a written reprimand in his personnel file. The reprimand stated:

> I EXPLAINED GEAR PRODUCTS POLICY CONCERNING DISCRIMINATION, DISCRIMINATORY ACTIONS, HARASSMENT, ETC. I TOLD PAUL THIS TYPE OF ACTIVITY WOULD NOT BE TOLERATED AND THAT ANY FURTHER INFRACTIONS OF COMPANY POLICY WOULD RESULT IN FURTHER DISCIPLINARY ACTIONS AGAINST HIM, UP TO AND INCLUDING DISCHARGE. I TOLD PAUL TO STAY IN HIS AREA AND DO HIS WORK.
>
> BILL STEELE AND I SPOKE WITH GEORGE TO MAKE SURE THAT HE WAS COMFORTABLE WITH THE ACTIONS WE HAD TAKEN IN RESOLVING THIS ACTIVITY. GEORGE SAID HE WAS FINE WITH IT.
>
> I SPOKE THREE DIFFERENT TIMES WITH GEORGE TO MAKE SURE HE WAS OK AND WAS COMFORTABLE WITH WORKING WITH PAUL.

TWO TIMES PAT COX WITNESSED THE CONVERSATION AND ONCE BILL STEELE WAS THERE.

Plaintiff was angry Loftis was not immediately fired. Loftis apologized to Plaintiff.[5] *Plaintiff stated Schrum yelled at Plaintiff and told Plaintiff to meet with him and Human Resources the next morning. Plaintiff states he went there and no one ever showed up so he just went back to work. There is no evidence he made any further effort to contact Human Resources.*

15. After Loftis' comment and reprimand, another coworker, *in thanking Plaintiff for helping him,* stated to Plaintiff, "thanks, you're all right for somebody that eats burritos." *There is nothing in the record to indicate this was spoken in a manner intended to be derogatory although Plaintiff perceived it to be a racial comment. Schrum took no action on his complaint regarding this comment.* In explaining the context of the statement, Plaintiff confirmed that during lunch, he ate burritos which were sold in a vending machine on Defendant's premises.

16. Plaintiff confirms that after notifying Schrum about the *second* "burrito" statement, nobody else made an inappropriate comment to Plaintiff.

17. Plaintiff testified that he won a television set at a company picnic sponsored by Defendant. Plaintiff believes evidence of a hostile work environment arises from comments made at the picnic that it was rigged for him to win the television and that it

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[5]There is nothing in the record to substantiate Plaintiff's belief that the apology was forced.

could not have gone to a more deserving person. Plaintiff took these comments to mean he was a poor minority.

18. Plaintiff admits that during his employment he engaged in "shop talk" with coworkers in which slang was used such as "dick head" but says he did not use names directed "toward their race." *Additionally, Plaintiff testified the men would sometimes rather graphically imitate physical sexual acts on each other.*

19. On July, 19, 1997, Plaintiff voluntarily resigned his employment with Defendant due to his belief that a coworker had threatened him. *Plaintiff had overheard a conversation in which he heard a worker say he knew where he (unidentified in the conversation) lived.*[6] *When Plaintiff confronted the worker, he said he was talking about someone else. Earlier that day, Plaintiff overheard Schrum tell a coworker that they had "every right to pick at Plaintiff's ears like a chicken."*

20. Plaintiff's sole basis for his constructive discharge claim revolves around his belief that Schrum was acting differently toward him.

21. Plaintiff admits that Defendant consistently raised his salary and certainly that would not compel his resignation from the company.

22. *A fellow employee, Harold Ray, told Plaintiff that he had heard Schrum use racial names in referring to Plaintiff while Plaintiff was still employed. Plaintiff also*

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[6]There was no evidence supporting Plaintiff's assertion that a statement was made regarding Plaintiff's children as part of this conversation.

heard two coworkers refer to an African-American who was hired shortly before Plaintiff quit as "Aunt Jemima." [7]

23. *Plaintiff had received some medication for stomach aches and headaches on June 9, 1997, which he advised his doctor were the result of having a lot of stress at work. The medical records note this is because of some changes at work. They also reflect his primary complaint was trouble with his ears.*

Arguments and Authority

The Court finds Plaintiff has failed to establish a claim of a hostile work environment. The Tenth Circuit requires this Court to apply a two-pronged test and find "under the totality of the circumstances" that (1) the harassment was pervasive or severe enough to alter the terms, conditions, or privileges of his employment, and (2) the harassment was racial or stemmed from racial animus. *Witt v. Roadway Express,* 136 F.3d 1424, 1432 (10th Cir. 1998). This requires a showing of more than a few isolated incidents of racial enmity. It requires "a steady barrage of opprobrious racial comments." *Id.* Casual comments, or accidental or sporadic conversation, are not sufficient to provide

[7]Defendant argues statements of workplace racial hostility against other minority workers are inadmissible hearsay however it appears they are being offered at this time to establish the state of mind of Plaintiff and therefore fall within a recognized exception. Defendant also asserts these may not be considered because the Court previously granted a motion in limine regarding this testimony. The purpose of a motion in limine is to allow the Court to address evidentiary matters prior to presentation to the jury. The Court's consideration of the evidence in this motion does not change the prior ruling. Plaintiff may also move for the introduction of evidence previously excluded by limine motion at trial should the development of the evidence at trial establish a basis for its introduction.

a basis for equitable relief. *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987).

In this case, Plaintiff worked for Defendant approximately two years. The workplace was one in which coworkers joked and addressed each other by offensive and inappropriate language on a regular basis. Plaintiff admits participating in this banter. There is also evidence that the "workplace teasing" included acting out of offensive sexual acts on fellow workers in the vein of the movie "Deliverance." Plaintiff was offended however, not by these boorish acts, but by what he perceived to be racial slurs directed to him in the daily interaction between workers. Even though Plaintiff characterizes the racial harassment as pervasive, over the course of his employment Plaintiff cites to only one incident which he reported the first year and two more incidents which he reported approximately nine months into his second year of employment.

Plaintiff places no date on the first incident but indicates it was shortly after he was transferred to work the first shift in April of 1996. This involved Schrum's brother, who Plaintiff asserts called him "Hector."[8] Plaintiff claims to have reported this to Schrum but states nothing was done about this. He then claims another worker called him "Julio" and "Carlos" but that when he was going to report this to Schrum, Schrum himself called him "Julio."

Almost one year later, on May 16, 1997, Schrum conducted an anti-harassment

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[8]There was an incident while Plaintiff worked the third shift which was never reported in which the term "tree-trimmer" was used. See Undisputed Facts 7 and 8. The Court now addresses only incidents of which the Defendant was aware.

meeting and training session in which he advised that racial and sexual references would not be allowed. This session was held at the direction of the company president following a complaint by an African-American worker who had received a letter with racial overtones. No reference was made to Plaintiff's earlier reported complaint. However, it was from this session that Plaintiff developed his belief that the company would automatically terminate anyone violating harassment policies when it is clear from the company policy that termination of employment is an option but that it is not mandated in every circumstance.

It was with this expectation that Plaintiff reported the incident immediately following the session in which he overheard coworker Loftis make the comment that was clearly derogatory toward Plaintiff and African-American co-workers. Loftis was reprimanded, however, Plaintiff did not accept the action taken by the company, albeit immediate, and when he advised Schrum of that fact, Schrum took the appropriate action of referring Plaintiff to the Human Resource Director. Even though the record reflects that the Human Resource Director was not available the next morning when Plaintiff went to meet with him, Plaintiff made no effort to reschedule or determine the reason the meeting did not take place.

There was one additional incident which Plaintiff reported to Schrum. This involved a statement which was not on its face racially degrading and there did not appear

to be any intent on the speaker's part for it to be.[9] See Undisputed fact #15. Nevertheless, Plaintiff found this to be a racially derogatory comment. After this, there were no additional incidents for some unidentified period of time until the last day of Plaintiff's employment.[10]

There is nothing in the record to corroborate that the conversation overheard by Plaintiff on his last day of employment was referencing this Plaintiff or posed a threat that a reasonable person would interpret as such. It, in fact, appears that Plaintiff's expectations of his working environment were highly unrealistic in light of the boorish behavior of his coworkers in which he participated without complaint. Further, even accepting that Plaintiff overheard Schrum tell other workers that they had every right "to pick at Plaintiff's ears like a chicken," that statement is accurate so long as the picking does not violate federally protected rights. If, as Plaintiff believed, any statement made by a coworker which Plaintiff perceived to be racial should have resulted in the coworker's immediate termination, the neutral workplace the federal laws are designed to protect and foster would conceivably be more difficult to achieve.

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[9]By this observation, narrowly based upon this record, the Court in no way implies that facially innocent statements cannot be the basis of a valid claim for a hostile working environment. Some of the most insidious discrimination is perpetuated by persons clever enough to disguise ill intent through double entendre.

[10]The parties have not established a time frame during which the second reported burrito reference was made or the company picnic was held other than after the training session in May. Plaintiff continued to work for approximately a two and one-half month period.

Applying the standard enunciated by the Tenth Circuit as to what constitutes harassment pervasive and severe enough to alter the terms, conditions or privileges of employment in 1998 in the *Witt* decision, this claim must fail under both the pervasive and severe tests which the Court found to be independent and equal grounds, applying the rationale of *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). The Plaintiff in *Witt* argued only that the harassment was pervasive. The Court addressed both tests however in its resolution of the claim.

The *Witt* Court first considered Plaintiff's argument that the harassment was pervasive. The Plaintiff argued that because he was a truck driver and was away from the physical workplace for long periods of time, the two incidents he raised over a two year time frame were sufficient. The Court disagreed, finding that two incidents over the time frame did not meet the test of a steady barrage of opprobrious racial comments required by *Hicks*. This Plaintiff presents complaints over a similar time frame which are far less serious than those raised in *Witt*. Accordingly, the Court concludes Plaintiff fails to establish that the harassment was pervasive in this case.

The *Witt* Court next addressed the severity standard and viewed this applying an objective, in addition to, a subjective component. Both incidents reported by *Witt* involved unquestionable racial slurs by use of the "n--" word and were undisguised incidents of racial disdain although the Court found one incident to be more severe. The Court held these did not meet the subjective test for severity based largely on the fact that

Witt testified that he shrugged and walked away from the comment.

While in this case, there is evidence that Plaintiff at one point obtained medication for stomach distress and headaches as a result of stress from changes at the workplace in June of 1997, he does not identify an incident which occurred at that time which triggered these problems that are tied to racial harassment sufficient to alter the terms or conditions of the workplace. In fact, Plaintiff's complaints regarding stomach distress and headaches were not the primary reason for seeking medical attention but appear to be secondary.[11]

Turning to the objective test, the Court in *Witt* considered the fact that neither comment was directed at Witt and that in one instance, the speaker did not know he was within earshot. The facts in the case at bar also involve comments not directly made to Plaintiff and overheard by him. In the incident which triggered Plaintiff's resignation, there was not even a direct reference to him and the speaker denied he was the subject of the discussion when questioned. In the earlier incident which resulted in a reprimand, the coworker apologized, a fact the *Witt* Court noted abates, at least somewhat, the severity of the incident.

Viewing the totality of the circumstances, the Court concludes Plaintiff has failed

[11]Plaintiff also admits he ate vending machine burritos every day for lunch which could contribute to his stomach distress.

to establish a claim for hostile work environment.[12]

The Court next addresses Plaintiff's claim of negligent supervision. Plaintiff cites to a Kansas case decided by the Tenth Circuit in support of his claim for negligent supervision, *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987). Notwithstanding the fact that this Court must apply Oklahoma law in this case, *Hicks* does not address this issue and cases decided after *Hicks* have rejected this cause of action. *See Farris v. Board of County Commissioners of Wyandotte County*, 924 F. Supp. 1041, 1051 (D. Kan. 1996).

Defendant correctly states that Oklahoma has not expressly addressed the issue of whether an employee can assert a negligent supervision claim against its employer for the acts of a coworker. However, the issue of whether this claim would be allowed under Oklahoma law need not be addressed by this Court. Because Plaintiff's claims are based upon the facts raised in support of his Title VII and §1981 claims and those facts have been determined by this Court to be insufficient as a matter of law, this claim must also fail.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion For Summary Judgment (Docket #12) is granted. Plaintiff shall take nothing on

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[12]The Court's findings necessarily exclude Plaintiff's claim for constructive discharge. There is no basis for finding that Plaintiff had no option but to resign due to race-based, intolerable working conditions. *Derr v. Gulf Oil Corp.*, 796 F.2d 340 (10th Cir. 1986).

his claims. Costs are awarded to Defendant upon timely application pursuant to N. D. LR 54.1. Each party is to pay its respective attorney's fees. A separate form of Judgment is being filed contemporaneously.

DATED THIS 26th DAY OF OCTOBER, 1999.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES AND JACQUELINE JONNES,

Plaintiffs,

vs.

AMERICAN AIRLINES, INC.,

Defendant.

Case No. 99-CV-238-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this 25th day of October, 1999.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LAVONDA SINGLETON,
SSN: 447-60-7104

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 98-CV-932-J

ORDER[1/]

Now before the Court is Plaintiff's appeal of a decision by the Commissioner of the Social Security Administration ("Commissioner") denying her disability insurance benefits under Title II of the Social Security Act and Supplemental Security Income benefits under Title XVI of the Social Security Act . The Administrative Law Judge ("ALJ"), Richard J. Kallsnick, denied benefits at step four of the sequential evaluation process used by the Commissioner to evaluate disability claims.

The ALJ determined that Plaintiff retained the residual functional capacity ("RFC") to perform light work. Given this RFC, the ALJ also found that Plaintiff could perform her past relevant work as a short-order cook. On appeal, Plaintiff argues (1) that the ALJ's RFC determination is not supported by substantial evidence, (2) that the ALJ improperly evaluated Plaintiff's subjective complaints, and (3) that the ALJ did not make required findings at Step Four. The Court has meticulously reviewed

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[1/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

the entire record and for the reasons discussed below the Court rejects Plaintiff's arguments and **AFFIRMS** the Commissioner's decision

I. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . .

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

> only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.[2/]

The standard of review applied by this Court to the Commissioner's disability determinations is set forth in 42 U.S.C. § 405(g). According to § 405(g), "the

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[2/] Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). See 20 C.F.R. § 404.1525. If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

II. DISCUSSION

A. First Alleged Error – The ALJ's RFC Determination is Not Supported by The Objective Medical Evidence

The ALJ determined that Plaintiff retained the RFC to perform light work. Plaintiff's primary objection is that she is obese and suffers from Systemic Lupus Erythematous ("SLE") and that the ALJ imposed no restrictions directly related to her obesity or SLE. Plaintiff does not, however, identify what additional restrictions the ALJ should have considered. Plaintiff also does not identify record support for any additional restrictions.

The medical record indicates that Plaintiff's SLE is under control and nearly asymptomatic. See *R. at 131, 134, 142, 154-55, 170, 175-81, and 201*. Other than the restrictions inherent in an RFC of light work, Plaintiff has failed to demonstrate that the medical evidence supports any additional restrictions based on her controlled SLE.

Plaintiff also argues that because she is obese it follows automatically that she will have difficulty bending, stooping, squatting or walking. Consequently, Plaintiff argues that the ALJ erred by not limiting her RFC further by imposing restrictions relating to bending, stooping, squatting or walking. Again, however, in addition to those restrictions inherent in light work, Plaintiff does not identify what additional restrictions should have been imposed. Plaintiff refers only to the statement by Angelo Dalessandro, a consultive examiner for the Commissioner, that the "range of motion of [Plaintiff's] joints [is] limited due to her obesity." *R. at 177*. There is,

however, nothing in the record to suggest that this limitation in range of motion is more severe than that contemplated by light work. It is also significant that no other physician, treating or otherwise, has ever placed any restrictions on Plaintiff's ability to bend, stoop, squat or walk.

Based on a meticulous review of the medical record, the Court finds that the ALJ's RFC determination is supported by the objective medical evidence.

B. Second Alleged Error – Incorrect Analysis of Plaintiff's Subjective Complaints

Plaintiff argues that in assessing Plaintiff's subjective complaints, the ALJ did not conduct a proper analysis under Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). Plaintiff argues that the ALJ first determined her RFC and then simply found her testimony to be inconsistent with that RFC to the extent its disagreed with the pre-determined RFC. The Court does not agree. The ALJ did not simply conform his assessment of Plaintiff's credibility to a predetermined RFC. The ALJ's credibility analysis is woven throughout his RFC analysis. See, e.g. *R. at 18-19*. During his evaluation of Plaintiff's credibility, the ALJ offers several reasons for not finding Plaintiff's testimony fully credible (e.g., the fact that Plaintiff got pregnant and carried a baby to term with no complications shortly before she alleges disability). The Court finds the ALJ's credibility analysis to be sufficient under Luna.

C. THIRD ALLEGED ERROR – IMPROPER STEP FOUR ANALYSIS

The Court finds that the ALJ's opinion adequately address the three phases of a Step Four analysis outlined by the Tenth Circuit in Winfrey v. Chater, 92 F.3d 1017, 1023-25 (10th Cir. 1996). In the first phase, the ALJ must evaluate the claimant's RFC. The ALJ clearly met this step by considering and thoroughly discussing Plaintiff's testimony and the medical record. In the second phase of a Step Four analysis, the ALJ must make findings regarding the demands of claimant's past relevant work. Here, the ALJ considered Plaintiff's description of her past relevant work and the vocational expert's testimony regarding the nature of Plaintiff's past relevant work. This evidence is sufficient to determine the demands of Plaintiff's past relevant work as a short-order cook. In the last phase of a Step Four analysis, the ALJ must determine if the claimant can meet the demands identified in phase two, despite the limitations identified in phase one. The ALJ satisfied this step by turning to the testimony of the vocational expert who testified that, even with her RFC for light work, Plaintiff could perform her past work as a cook. The Court finds, therefore, that the ALJ adequately complied with Winfrey's requirements in determining that Plaintiff could perform her past work. See, e.g., Dixon v. Apfel, No. 98-5167, 1999 WL 651389 at *1-2 (Aug. 26, 1999)

CONCLUSION

For the reasons discussed above, the Commissioner's decision to deny disability benefits under Titles II and XVI of the Social Security Act is **AFFIRMED**.

IT IS SO ORDERED.

Dated this 26 day of October 1999.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LAVONDA SINGLETON,
SSN: 447-60-7104

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 98-CV-932-J

JUDGMENT

This action has come before the Court for consideration, and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 26 day of October 1999.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MULTIMEDIA GAMES, INC., a Texas corporation,	)	ENTERED ON DOCKET
	)	DATE OCT 27 1999
Plaintiff,	)	
	)	98-CV-67-H(M)
v.	)	FILED
	)	OCT 26 1999
NETWORK GAMING INTERNATIONAL CORPORATION, a Canadian corporation,	)	Phil Lombardi, Clerk U.S. DISTRICT COURT
	)	
Defendant.	)	

JUDGMENT

This matter came before the Court for a trial by jury from September 27, 1999, to October 22, 1999. On October 22, 1999, the jury returned its verdict, finding that Plaintiff-Counter-Defendant Multimedia Games, Inc. ("Multimedia") had failed to prove its claims of breach of contract against Defendant-Counter-Plaintiff Network Gaming International Corp. ("NGI") and that NGI had proved its claims of breach of contract against Multimedia. The jury awarded NGI $3,106,961.39 in damages.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for NGI on Multimedia's breach of contract claims.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for NGI and against Multimedia in the amount of $3,106,961.39 on NGI's counter-claims for breach of contract.

IT IS SO ORDERED.

This 25TH day of October, 1999.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

MIKEAL BLEVINS,

Defendant.

No. 99CV0464BU(J)

ENTERED ON DOCKET
DATE OCT 27 1999

DEFAULT JUDGMENT

This matter comes on for consideration this 25th day of Oct, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Mikeal Blevins, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Mikeal Blevins, was served with Summons and Complaint on September 3, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Mikeal Blevins, for the principal amount of $2,225.05, plus accrued interest of $1,807.00, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of

$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

PEP/llf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 99CV0597B(E)
FREDA M. ALLEN,	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 25th day of Oct., 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Freda M. Allen, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Freda M. Allen, was served with Summons and Complaint on July 22, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Freda M. Allen, for the principal amount of $2,634.94, plus accrued interest of $1,027.07, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of $150.00 as

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41% percent per annum until paid, plus costs of this action.

Thomas R. Brett
United States District Judge

Submitted By:

Phil Pinnell

PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

PEP/llf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

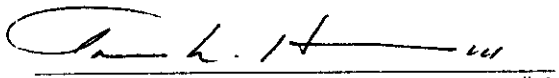
AVTECH, INC., an Oklahoma corporation, and DONALD A. MCCANCE, an individual,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 98-CV-0935BU (E)
ROYAL VISTA PLASTICS, INC., an Oklahoma corporation, and TROY STONE, an individual,	)	
Defendants.	)	

STIPULATION OF DISMISSAL

NOW, on this 22nd day of October, 1999, Plaintiffs, Avtech, Inc., and Donald A. McCance, and Defendants, Royal Vista Plastics, Inc., and Troy Stone, hereby stipulate to the dismissal of the above styled and numbered cause, pursuant to Federal Rule 41(a)(1), with prejudice.

BRIAN J. RAYMENT, OBA #7441
KIVELL, RAYMENT AND FRANCIS
A Professional Corporation
7666 East 61st Street, Suite 240
Tulsa, Oklahoma 74133
(918) 254-0626

ATTORNEYS FOR PLAINTIFFS



JOSEPH L. HULL, III, OBA #4477
Council Oak Center
1717 South Cheyenne
Tulsa, Oklahoma 74119
(918) 582-8252

ATTORNEYS FOR DEFENDANTS

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBRA F. HOBGOOD,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 99-CV-569-EA

ORDER

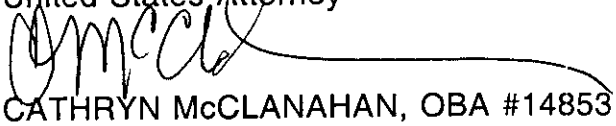
Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3).

DATED this 25th day of October 1999.

Claire V. Eagan
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



CATHRYN McCLANAHAN, OBA #14853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEBRA F. HOBGOOD,	)	
SSN: 455-02-1058,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 99-CV-0569-EA**
	)	
KENNETH S. APFEL, Commissioner,	)	
Social Security Administration,	)	
	)	
Defendant.	)	

ADMINISTRATIVE CLOSING ORDER

The defendant having filed its motion to remand pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3), and these proceedings being stayed by Order dated October 25, 1999, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, within 60 days of the date of this Administrative Closing Order, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 25th day of October, 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CEDRIC SEBASTIAN STUBBS,

Defendant.

Case No. 93-CR-108-E
(99-CV-731-E)

JUDGMENT

This matter came before the Court upon the Motion Pursuant to 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket #15) of the Defendant, Cedric Sebastian Stubbs. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Plaintiff and against Defendant.

IT IS SO ORDERED THIS 21st DAY OF OCTOBER, 1999.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBY EARL JONES,

Petitioner,

vs.

STEVE HARGETT, Warden,

Respondent.

Case No. 97-CV-1011-K (M)

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently in the custody of the Oklahoma Department of Corrections, challenges his conviction entered in Tulsa County District Court, Case No. CRF-95-228. Respondent has filed a Rule 5 response (#10). Petitioner has filed a reply (#16). Petitioner has also filed a "motion for speedy disposition" (#19). For the reasons discussed below, the Court finds that this petition should be denied. Today's decision renders Petitioner's "motion for speedy disposition" moot.

BACKGROUND

Petitioner was charged with Robbery by Force, After Former Convictions of Two or More Felonies, in Tulsa County District Court, Case No. CRF-95-228. Attorneys from the Tulsa County Public Defenders Office defended Petitioner throughout his criminal proceedings, including his direct appeal. At a preliminary hearing conducted February 16, 1995, Petitioner was represented by public defender S. Stephen Barnes. At subsequent hearings and throughout his bifurcated trial, Petitioner was represented by public defender Ronald R. Wallace. A jury found Petitioner guilty of

Robbery by Force, After Former Convictions of Two or More Felonies, and he was sentenced to thirty-five (35) years imprisonment.

Petitioner perfected a direct appeal. Represented by Barry Derryberry, a different attorney from the Public Defender's Office, Petitioner raised five (5) propositions of error: (1) admission of an in-court identification of the defendant, which was tainted by a suggestive pretrial identification procedure, violated the defendant's right to due process; (2) information about another robbery was unlawfully injected into the trial in violation of defendant's right to due process; (3) the legal instruction defining robbery omitted a distinct statutory element, causing structural error; (4) the legal instructions in the punishment stage lacked any description of the elements to be found by the jury; and (5) an instruction which negated the presumption of innocence in the punishment stage of trial is fundamentally in error. (#10, Ex. B). On April 19, 1996, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed Petitioner's conviction and sentence in an unpublished summary opinion. (#10, Ex. A).

Appearing *pro se*, Petitioner sought federal habeas corpus relief in this Court. See Case No. 96-CV-981-K. However, on May 13, 1997, that case was dismissed without prejudice for failure to exhaust available state remedies on Petitioner's own motion.

On June 20, 1997, Petitioner filed an application for post-conviction relief in the trial court. (#10, attachment to Ex. D). The trial court denied the requested relief on August 12, 1997. (#10, attachment to Ex. D). Petitioner appealed the denial of post-conviction relief to the OCCA, raising the following issues: (1) Respondent erred by not addressing the trial court's lack of jurisdiction under bifurcated procedures and the lack of trial court jurisdiction under bifurcated procedure cannot be waived or barred by state procedural default rule; (2) Petitioner was denied reasonably effective

assistance of counsel at the preliminary hearing held February 16, 1997; (3) Petitioner was denied reasonably effective assistance of counsel at trial; and (4) appellate counsel was not reasonably effective, because he did not raise three instances of prosecutorial misconduct contributing to the jury's guilty verdict and denying Petitioner a fair trial. (#10, Ex. D). On October 8, 1997, the OCCA affirmed the denial of post-conviction relief. (#10, Ex. C).

Petitioner filed the instant petition on November 13, 1997 alleging the following nine (9) propositions of error: (1) trial court lacked subject matter jurisdiction, (2) ineffective assistance of counsel during preliminary proceedings, (3) ineffective assistance of trial counsel; (4) prosecutorial misconduct; (5) there was no probable cause to bind over at preliminary hearing for trial; (6) the trial court erred by not granting a mistrial when the prosecutor used prejudicial other crimes evidence in the form of an evidentiary harpoon; (7) ineffective assistance of counsel at the preliminary hearing; (8) ineffective assistance of appellate counsel; and (9) admission of an in-court identification of the defendant, which was tainted by a suggestive pretrial identification procedure, violated the defendant's rights to due process (#1). In his response to the petition, Respondent argues that claims 1-7 are procedurally barred from this Court's review and that claims 8 and 9 are without merit.

ANALYSIS

A. Evidentiary hearing

In this case, Petitioner requested evidentiary hearings in state court. However, those requests were denied. (See #10, Ex. C at 5; and state district court's order denying post-conviction relief, attachment to #10, Ex. C). Therefore, Petitioner shall not be deemed to have "failed to develop the factual basis of a claim in State court." Miller v. Champion, 161 F.3d 1249, 1253 (10th Cir. 1998).

Accordingly, Petitioner's request for an evidentiary hearing is not governed by 28 U.S.C. § 2254(e)(2), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Instead, his request must be reviewed under standards applicable prior to enactment of the AEDPA. Id. Under pre-AEDPA standards, a habeas petitioner had to make allegations which, if proven true and "not contravened by the existing factual record, would entitle him to habeas relief." Id. In this case, the Court has reviewed the petition and request for an evidentiary hearing and finds that Petitioner has not met his burden of proving entitlement to an evidentiary hearing because no additional factual development is necessary to resolve his claims. Therefore, the Court concludes that no evidentiary hearing is necessary.

B. Exhaustion

As a preliminary matter, the Court must determine whether each of Petitioner's claims has been exhausted as required by 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either showing (a) the state's appellate court has had an opportunity to rule on the same claim presented in federal court, or (b) there is an absence of available State corrective process or circumstances exist that render such process ineffective to protect the rights of the applicant. 28 U.S.C. § 2254 (b); see also White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). The exhaustion doctrine is "'principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings.'" Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)).

In his response, Respondent asserts that Petitioner has never presented his claim of prosecutorial misconduct, i.e., his fourth claim, to the OCCA. As a result, Respondent contends that this petition is subject to dismissal as a mixed petition as required by Rose v. Lundy, 455 U.S. 509, 522 (1982). Petitioner replies that he did raise the prosecutorial misconduct claim as his fourth proposition of error in his post-conviction appeal (#16). After reviewing the state court pleadings, the Court notes that a determination of the exhaustion status of this claim is complicated by Petitioner's garbled and confusing presentation of his claims in his state post-conviction proceedings.[1] However, based on the OCCA's order affirming the denial of post-conviction relief, the Court finds that the OCCA did not consider "prosecutorial misconduct" as a separate claim. Therefore, although Petitioner did argue on post-conviction appeal that appellate counsel provided ineffective assistance of counsel when he failed to raise the prosecutorial misconduct claim on direct appeal, he has not presented his prosecutorial misconduct claim to the OCCA as a separate substantive claim.

However, to require Petitioner to return to state court to exhaust his prosecutorial misconduct claim would be futile. Petitioner has procedurally defaulted his claim two (2) times: first, when he failed to raise the claim on direct appeal; and second, when he failed to raise a separate claim of prosecutorial misconduct in his post-conviction proceeding. Although the Court could require Petitioner to return to state court to raise the claim in yet another post-conviction application, the OCCA consistently applies a procedural bar to such claims unless the petitioner provides "sufficient

[1]In his application for post-conviction relief filed in the state district court, several of Petitioner's propositions of error are rambling and include multiple claims. See #10, attachment to Ex. C, Application for Post-Conviction Relief, filed June 20, 1997, at 6, 8, 12, 14.

reason" for his failure to raise the claim in an earlier proceeding. Okla. Stat. tit. 22, § 1086; Moore v. State, 889 P.2d 1253 (Okla. Crim. App. 1995). The Court is convinced that to require Petitioner in this case to return to state court to exhaust his prosecutorial misconduct claim would be futile because the state courts would undoubtedly impose a procedural bar on the claim. As a result, a state remedy is unavailable and Petitioner's claim is not barred by the exhaustion requirement of 28 U.S.C. § 2254(b). See Duckworth v. Serrano, 454 U.S. 1, 3 (1981); see also Coleman v. Thompson, 501 U.S. 722 (1991); Steele v. Young, 11 F.3d 1518, 1524 (10th Cir. 1993).

C. Procedural Bar

Respondent argues that Petitioner's claims numbered 1, 2, 3, 5, 6, and 7 as well as Petitioner's prosecutorial misconduct claim, claim number 4, should the Court find it would be futile to require Petitioner to return to state court to exhaust, are barred by the doctrine of procedural default. After reviewing the record of Petitioner's state court proceedings, the Court finds that Petitioner's claim number 6 was "fairly presented" to the OCCA on direct appeal. Furthermore the OCCA considered the merits of Petitioner's claim number 1 on post-conviction appeal. Therefore, claims 1 and 6 are not procedurally barred and are discussed in Section D below.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined or would decline to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.);

Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

1. Ineffective assistance of counsel (claims numbered 2, 3 and 7)

Respondent argues that Petitioner's ineffective assistance of preliminary hearing and trial counsel claims are procedurally barred from this Court's review. According to Respondent, the OCCA imposed a procedural bar on these claims, first raised in post-conviction proceedings, pursuant to "adequate and independent" state procedural rules.

However, when the underlying claim is ineffective assistance of counsel, the Tenth Circuit Court of Appeals has recognized that countervailing concerns justify an exception to the general rule of procedural default as stated in Coleman. Brecheen v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994) (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)). The unique concerns are "dictated by the interplay of two factors: the need for additional fact-finding, along with the need to permit the petitioner to consult with separate counsel on appeal in order to obtain an objective assessment as to trial counsel's performance." Id. at 1364 (citing Osborn v. Shillinger, 861 F.2d 612, 623 (10th Cir. 1988)). The Tenth Circuit explicitly narrowed the circumstances requiring imposition of a procedural bar on ineffective assistance of counsel claims first raised collaterally in English v. Cody, 146 F.3d 1257 (10th Cir. 1998). In English, the circuit court concluded that:

> Kimmelman, Osborn, and Brecheen indicate that the Oklahoma bar will apply in those limited cases meeting the following two conditions: trial and appellate counsel differ; and the ineffectiveness claim can be resolved upon the trial record alone. All other ineffectiveness claims are procedurally barred only if Oklahoma's special

appellate remand rule for ineffectiveness claims is adequately and evenhandedly applied.

Id. at 1264 (citation omitted).

After reviewing the record in the instant case in light of the factors identified in English, the Court concludes Petitioner's claims of ineffective assistance of counsel at trial and at preliminary hearing are procedurally barred. As stated above, at the preliminary hearing held February 16, 1995, Petitioner was represented by Samuel Stephen Barnes, an attorney from the Tulsa County Public Defender's Office. At the March 2, 1995 preliminary hearing and at trial, Petitioner was represented by Ronald R. Wallace, also an attorney from the Tulsa County Public Defender's Office. On appeal, Petitioner was represented by Barry L. Derryberry, yet another attorney from the Tulsa County Public Defender's Office. For purposes of the first requirement identified in English, the Court finds that although Petitioner's trial and appellate counsel all worked in the same office, Petitioner nonetheless had the opportunity to confer with separate counsel on appeal.

Also, the Court finds that each of Petitioner's allegations of ineffective assistance of counsel occurring at the preliminary hearings and at trial could be resolved upon the trial record alone. As his second and seventh propositions of error, Petitioner complains that the attorney representing him at the preliminary hearing "never met with me anytime prior to the February 16th, 1995 preliminary examination to discuss the facts of this case or to prepare any type of a defense for unnecessarily suggestive identification procedures" (#1 at 10) and that as a result, his attorney failed to "interpose timely and proper objections to impermissibly suggestive identification procedures." (#1 at 11). Regardless of the amount of time defense counsel spent conferring with Petitioner prior to the preliminary hearing, the complained of result is that counsel failed to object to the identification

procedures used at the preliminary hearing. See United States v. Cronic, 466 U.S. 648 (1984). Counsel's failure to object to the identification procedures allowed by the trial court is readily apparent from the preliminary hearing record. In addition, the record indicates that the trial court denied a motion to quash the preliminary hearing filed by trial counsel. (Tr. Trans. at 48-49). Furthermore, the store clerk testified during cross-examination by defense counsel at both the preliminary hearing and at trial that he had not previously identified Petitioner as the robber based on any line-up or photo-ID conducted by police. (See Prelim. Hrg. Trans. at 11; Tr. Trans. at 26-27). Thus, the facts underlying Petitioner's second and seventh claims are readily apparent from the record. As his third proposition of error, Petitioner claims that his trial counsel provided ineffective assistance when he would not let Petitioner testify in his defense at his jury trial. Again, the fact that Petitioner did not testify at trial is evident from the trial record. Because each of Petitioner's claims of ineffective assistance of counsel or the result of the claim is apparent from the record, the Court concludes the second factor identified in English is satisfied and these claims are procedurally barred.

This Court is precluded from reviewing Petitioner's claims unless Petitioner can overcome the procedural bar by demonstrating "cause and prejudice" for the default of his claims or that a "fundamental miscarriage of justice" will result if his claims are not heard on the merits. Coleman, 501 U.S. at 750. Petitioner attempts to demonstrate "cause" for the default of his claims by arguing his appellate counsel provided ineffective assistance in failing to raise the ineffective assistance of trial counsel claims on direct appeal. To establish "cause" via an ineffective assistance of appellate counsel claim, Petitioner must satisfy the standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984). See Murray v. Carrier, 477 U.S. 478, 488-89 (1986); United States v. Cook, 45 F.3d

388, 394-95 (10th Cir. 1995). The Strickland test requires a showing of both deficient performance by appellate counsel and prejudice to Petitioner as a result of the deficient performance. 466 U.S. at 687. To satisfy the deficient performance prong of the test, Petitioner must overcome a strong presumption that counsel's conduct fell within the "wide range of reasonable professional assistance [that] . . . might be considered sound trial strategy." Brecheen, 41 F.3d 1365 (citations omitted). "A claim of ineffective assistance must be reviewed from the perspective of counsel at the time and therefore may not be predicated on the distorting effects of hindsight." Id. (citations omitted). Finally, the focus of the first prong is "not what is prudent or appropriate, but only what is constitutionally compelled." Id. To establish the prejudice prong of the test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694. Failure to establish either prong of the Strickland standard will result in denial of relief. Id. at 696.

In the instant case, the Court finds appellate counsel's failure to raise the ineffective assistance of trial counsel claims was not ineffective assistance constituting "cause" because Petitioner's claims of ineffective assistance of counsel at preliminary hearing and at trial lack merit. See Hawkins v. Hannigan, 185 F.3d 1146, 1152 (10th Cir. 1999) (stating that if issue omitted by allegedly ineffective appellate counsel lacks merit, then counsel's failure to raise it does not amount to constitutionally ineffective assistance). The Court rejects Petitioner's claim that counsel was ineffective by failing to object to the in-court identification of Petitioner during the February 16, 1995 preliminary hearing. On cross-examination, the witness testified that the police never brought him a photo line-up and that he had never viewed a line-up (Prelim. Hrg. Trans. at 11). He also

testified that his vision was immediately blurred upon being sprayed with pepper gas (Prelim. Hrg. at 13). This line of questioning by defense counsel reflects counsel's effort to show that the witness was unreliable and offers a reasonable explanation for his failure to object. Thus, Petitioner's ineffective assistance of counsel claim does not present a substantial constitutional issue and appellate counsel's failure to raise the claim on direct appeal cannot serve as "cause" to excuse the procedural default.

Similarly, Petitioner's claim that trial counsel provided ineffective assistance when he advised Petitioner not to testify in his own defense is without merit and appellate counsel did not provide ineffective assistance in failing to raise the claim on direct appeal. Had Petitioner testified at trial, the prosecution could have been allowed to use his prior felony convictions to impeach his credibility during the guilt/innocence stage of trial. An attorney has the discretion to advise a client whether he should testify on his behalf. Even if Petitioner now disagrees with his trial counsel's advice, that advice could at worst be called bad trial strategy, not constitutionally deficient legal performance. See Johnson v. Lockhart, 921 F.2d 796, 800 (8th Cir. 1990). The Court finds that, under these circumstances, Petitioner's allegation that trial counsel's advice to Petitioner not to testify was constitutionally ineffective assistance of counsel is without merit and appellate counsel's failure to raise the claim on direct appeal cannot serve as "cause" to excuse the procedural default.

To summarize, Petitioner's claims of ineffective assistance of trial counsel are rejected because Petitioner has failed to satisfy the deficient performance prong of the Strickland standard.[2] Therefore, appellate counsel did not provide ineffective assistance in failing to raise the claims on

[2]Assuming, arguendo, that Petitioner's claims of ineffective assistance of counsel were not procedurally barred allowing a direct consideration of the claims on the merits, the Court finds that relief would be denied on this claim due to Petitioner's inability to satisfy the performance prong of the Strickland standard.

appeal and Petitioner has failed to demonstrate "cause" sufficient to overcome the procedural bar.

The only other avenue by which Petitioner can have his claims of ineffective assistance of trial counsel reviewed directly is by showing that a "fundamental miscarriage of justice" will result if the procedural bar is invoked. This exception applies "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. at 495-96 (1986). Although Petitioner does state that the trial errors he complains of "resulted in the actual conviction of one who is actually innocent" (see #16 at 21), Petitioner's claim of innocence is merely a conclusory statement. He offers nothing in support his claim. To meet the narrow fundamental miscarriage of justice standard, "the petitioner must supplement his habeas claim with a *colorable* showing of factual innocence." Demarest v. Price, 130 F.3d 922, 941 (10th Cir.1997) (emphasis added). Petitioner has presented no evidence of his innocence. Therefore, the Court finds that Petitioner has failed to make a colorable showing of actual innocence sufficient to fall within the fundamental miscarriage of justice exception and concludes Petitioner's claims of ineffective assistance of preliminary hearing and trial counsel are procedurally barred. Therefore, habeas relief on this basis is hereby denied.

2. Claims of prosecutorial misconduct and lack of probable cause (claims numbered 4 and 5)

Respondent argues that this Court is precluded from considering Petitioner's claim numbered 5 because in its order affirming the trial court's denial of post-conviction relief, the OCCA found Petitioner had waived his post-conviction claims by failing to raise them on direct appeal. In addition, because it would be futile to require Petitioner to return to state court to present his claim

of prosecutorial misconduct (claim 4) as a separate substantive claim to the OCCA, Petitioner has procedurally defaulted that claim. The OCCA's procedural bar as applied to these claims was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the OCCA has consistently applied a procedural bar and has denied such claims unless the petitioner provides "sufficient reason" for his failure to raise the claim earlier. Moore v. State, 889 P.2d 1253 (Okla. Crim. App. 1995). As a result, the Court agrees that Petitioner's constitutional claims numbered 4 and 5 are procedurally barred from this Court's review unless Petitioner demonstrates "cause and prejudice" or that a fundamental miscarriage of justice will occur if the claim is not considered. See Coleman, 510 U.S. at 750; Hoxsie v. Kerby, 108 F.3d 1239, 1243 (10th Cir. 1997).

As he argued on post-conviction appeal before the OCCA, Petitioner now argues that his appellate counsel provided ineffective assistance of counsel in failing to raise his claims related to his preliminary hearing on direct appeal. The OCCA rejected Petitioner's argument that the failure to raise the claims on direct appeal was attributable to ineffective assistance of appellate counsel. The Court has discussed the applicable Strickland standard above. Petitioner's claim concerning the trial court's lack of probable cause to bind over for trial is related to his allegations that the identification procedure violated due process and that the trial court lost jurisdiction to enhance his sentence with his prior convictions. As discussed below, the OCCA considered and rejected both the identification and jurisdiction claims. As a result, Petitioner cannot satisfy the prejudice prong of the Strickland standard because he cannot demonstrate that he was prejudiced by appellate counsel's failure to raise a lack of probable cause argument on direct appeal.

As to his separate claim of prosecutorial misconduct, the procedural bar results not only from

Petitioner's failure to raise the claim on direct appeal, but also from his own failure to raise the claim on post-conviction appeal. Petitioner has not asserted any ground constituting "cause" for his failure to present this claim on post-conviction appeal. Finding no cause sufficient to overcome the procedural default of the claim, the Court concludes that habeas corpus relief should be denied as the claim is procedurally barred.

Petitioner's only other means of gaining federal habeas review of these procedurally barred claims is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 506 U.S. 390, 403-404 (1993); Sawyer v. Whitley, 505 U.S. 333, 339-340 (1992). As discussed above, Petitioner has failed to make a colorable showing of actual innocence sufficient to fall within the fundamental miscarriage of justice exception. Furthermore, nothing in the record indicates that barring these claims will result in a fundamental miscarriage of justice. Therefore, the Court finds that the fundamental miscarriage of justice exception has no application to this case.

Having failed to show either "cause and prejudice" or a "fundamental miscarriage of justice" sufficient to overcome the procedural bar, Petitioner's fourth and fifth claims should be denied as procedurally barred.

D. Claims rejected by the OCCA on the merits

1. Standard of review under the AEDPA

Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, this Court cannot grant habeas corpus relief on Petitioner's claims adjudicated by the OCCA either on direct appeal or on post-conviction appeal unless the adjudication of the claims –

(1) resulted in a decision that was contrary to, or involved an unreasonable

application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Petitioner's first claim, challenging the trial court's jurisdiction to enhance his sentence with his prior convictions, was considered by the OCCA on the merits in Petitioner's post-conviction appeal. See #10, Ex. C at 5. Similarly, during Petitioner's post-conviction appeal, the OCCA considered Petitioner's ineffective assistance of appellate counsel claim on the merits as possible "cause" to overcome Petitioner's procedurally defaulted claims. The state appellate court rejected the argument, concluding that appellate counsel was not ineffective. See #10, Ex. C. The OCCA also considered and rejected Petitioner's sixth claim, that the injection of other crimes evidence violated his right to due process, and his ninth claim, that the admission of an in-court identification of Petitioner violated his right to due process, during Petitioner's direct appeal. See #10, Ex. A. Therefore, unless the Court of Criminal Appeals's adjudication of these claims was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," this Court must deny the requested habeas relief as to those claims. 28 U.S.C. § 2254(d).

2. *Review of Petitioner's claims*

a. Challenge to trial court's jurisdiction (Claim 1)

According to Petitioner, the trial court lacked "jurisdiction" to enhance his sentence with his prior convictions. In its order affirming the state trial court's denial of post-conviction relief, the OCCA rejected this claim on the merits and stated that:

> [t]he one claim Petitioner characterizes as a 'jurisdictional' (that he was not bound over on the second page at preliminary hearing and thus the trial court had no jurisdiction to enhance his sentence with prior convictions) is simply not supported by the record. The docket sheet shows Petitioner was bound over on the second page of the Information and thereafter entered a plea to the Information. Petitioner's complaint that his attorney was ineffective for stipulating to page two of the Information at preliminary hearing is without merit, because Petitioner did not object on the record and then proceeded to enter a plea to the Information. *Sadler v. State*, 846 P.2d 377, 386 (Okl.Cr.1993); *Thomas v. State*, 744 P.2d 974-974-75 (Okl.Cr.1987).

(#10, Ex. C at 5). To the extent the OCCA's rejection of Petitioner's claim was premised on facts found in the trial court's docket sheet, this Court cannot grant habeas corpus relief unless the OCCA's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Based on this Court's review of the docket sheet provided by Petitioner (#16, App. A) and the transcripts provided by Respondent, the Court finds that the OCCA's rejection of Petitioner's claim was not an unreasonable determination of the facts in light of the evidence presented in the state proceeding. According to the docket sheet, Petitioner was bound over to the district court on the second page of the information for hearing on March 13, 1995. Furthermore, Petitioner was represented by counsel throughout his criminal proceedings and thus had notice of the status of the charges against Petitioner.

To the extent Petitioner challenges the adequacy of the information under Oklahoma law, this is a question of state law. See Johnson v. Gibson, 169 F.3d 1239, 1252 (10th Cir. 1999). On federal habeas review, this Court is not empowered to correct all errors of state law. See Jackson v. Shanks, 143 F.3d 1313, 1317 (10th Cir.1998). Habeas relief may be granted to a state prisoner "only if state court error deprived him of fundamental rights guaranteed by the Constitution of the United States." Id. (citation and internal quotation omitted). A charging instrument may violate the Sixth

Amendment by failing to provide a defendant with adequate notice of the nature and cause of the accusations filed against him. See, e.g., Hunter v. State, 916 F.2d 595, 598 (10th Cir.1990). The information in this case, however, was adequate to provide Petitioner with notice of the substantive charge against him. Parke v. Raley, 506 U.S. 20, 27 (1992) (citing Oyler v. Boles, 368 U.S. 448, 452 (1962) (due process does not require advance notice that trial for substantive offense will be followed by habitual-criminal accusation)). Therefore, the defect alleged here does not rise to the level of a federal constitutional violation. The OCCA's rejection of this claim comports with Supreme Court precedent and habeas corpus relief should be denied.

b. Ineffective assistance of appellate counsel claim (Claim 8)

Petitioner asserts as part of his eighth claim that he received ineffective assistance of appellate counsel when counsel failed to raise three (3) instances of prosecutorial misconduct on direct appeal. According to Petitioner, his trial was rendered unfair when the prosecutor unlawfully (1) injected other crimes evidence through her questioning of a police officer, (2) manipulated testimony of the robbery victim, and (3) used the preliminary hearing as a setting to secure identification of Petitioner as the robber.

In rejecting this claim during Petitioner's post-conviction appeal, the OCCA applied the Strickland standard and found that appellate counsel provided constitutionally effective assistance (see #10, Ex. C). As stated by the OCCA,

> The record shows the District Court applied the proper test to Petitioner's claims of ineffective counsel and it does not establish that Petitioner's appellate counsel rendered deficient performance sufficient to show the trial was unfair or the verdict suspect. Failure to raise each and every issue is not determinative of ineffective assistance of counsel and counsel is not required to advance every cause

> or argument regardless of merit. *See Cartwright v. State*, 708 P.2d 592, 594 (Okl.Cr.1985); *Day v. Hargett*, 937 P.2d 502, 503 (Okl.Cr.1997).

(Id. at 4-5). As discussed above, to establish ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694. Failure to establish either prong of the Strickland standard will result in denial of relief. Id. at 696. As determined in Part C, above, appellate counsel's failure to raise the procedurally defaulted claims on direct appeal does not constitute deficient performance under Strickland. Appellate counsel need not advance every argument on appeal urged by a defendant, regardless of merit. Evitts v. Lucey, 469 U.S. 287, 394 (1985). Therefore, as a substantive matter, appellate counsel's failure to raise the claims identified by Petitioner on direct appeal does not constitute ineffective assistance of counsel. As a result, after reviewing the record, the Court finds that the OCCA's rejection of Petitioner's ineffective assistance of appellate counsel claim was entirely consistent with Supreme Court precedent and habeas corpus relief on this basis should be denied.

c. Challenge to identification procedures (Claim 9)

Petitioner's ninth proposition of error in the instant petition and first proposition of error raised on direct appeal was that the "admission of an in-court identification of the defendant, which was tainted by a suggestive pretrial identification procedure, violated the defendant's right to due process." Petitioner also argues in the instant case that the OCCA failed to reverse his conviction

on this ground because his appellate counsel inadequately asserted the claim on direct appeal. In affirming Petitioner's conviction on direct appeal, the OCCA rejected Petitioner's claim, finding that "[a]fter thorough consideration of the entire record before us on appeal including the original record, transcripts, briefs and exhibits of the parties, we have determined that neither reversal nor modification is required under the law and evidence." (#10, Ex. A).

As stated above, this Court cannot grant habeas corpus relief on a ground previously adjudicated by the state court unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d). After reviewing the record, the Court finds that the identification of Petitioner by the state's witness, the store clerk who was robbed, was independently reliable. The Supreme Court has held that even where the pretrial identification procedures are unduly suggestive, the in-court identification is still proper if the identification is shown to be independently reliable. Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Simmons v. United States, 390 U.S. 377, 384 (1968). In Manson, 432 U.S. at 114, the Court listed the criteria to be examined in evaluating this issue: "reliability is the linchpin in determining the admissibility of identification testimony . . . The factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the length of time between the crime and the confrontation." (See also Neil v. Biggers, 409 U.S. 188, 199-200 (1972). The transcript of the trial held on May 18 and 19, 1995, reveals that the identification was independently reliable. The victim had an excellent opportunity to view Petitioner as he approached the store and proceeded to commit the robbery. (Tr. Trans. at

10). Petitioner was just across the store's counter from the victim during the robbery (Tr. Trans. 10-11) and was in the store for approximately 12-15 seconds (Tr. Trans. at 22). The level of certainty of the victim at trial when he identified Petitioner was high. The victim stated in court that Petitioner committed the robbery (Tr. Trans. at 15-16). There is no evidence that the witness was the least bit uncertain in his identification at trial or during the preliminary hearing (Tr. Trans. 26-28). The witness further testified that his identification of Petitioner as the robber at both the preliminary hearing and trial was based on his memory of the events of January 11, 1995 (Tr. Trans. at 27-28). Finally, the length of time between the crime and the confrontation was not out of the ordinary. The crime occurred on January 11, 1995 and the preliminary hearing took place less than five (5) weeks later (Tr. Trans. at 26). This is not an extraordinary length of time. The Supreme Court upheld an identification following a seven-month interlude in Neil v. Biggers, 409 U.S. at 200. Weighing all the factors and considering the totality of the circumstances, there is no substantial likelihood of misidentification and the OCCA's rejection of Petitioner's claim was not an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. Habeas corpus relief on this claim should be denied.

d. Injection of other crimes evidence at trial (Claim 6)

As his sixth claim, Petitioner asserts that his right to due process was violated when the trial court denied a motion for mistrial after information about another robbery was unlawfully injected into the trial. Although Petitioner states in his petition that this claim was not presented on direct appeal, a review of the brief filed by appellate counsel indicates the claim was raised as "Proposition II." The OCCA rejected the claim in its summary opinion affirming Petitioner's conviction (#10, Ex.

A). Therefore, the § 2254(d) standard applies to the consideration of this claim.

Petitioner complains that the trial court erred in refusing to grant a mistrial after the prosecutor violated his due process rights by questioning a police officer on direct examination as follows:

Q: And during the course of the evening on your shift, tell the jury if you had an opportunity to respond to any other robberies?

A: Yes, I did.

Q: Later that night, they put an armed robbery –

Mr. Wallace: Judge, I'm going to interpose an objection to this. May I approach the bench?

The Court: Approach.

(At the bench, out of hearing of the jury:)

Mr. Wallace: At this time I would move for a mistrial. There has been no notice give to the Defendant concerning the introduction of any other crimes in this case, and I will object to this and move for a mistrial.

* * * *

The Court: . . . I'm going to overrule and give an exception and admonish the jury.

Mr. Wallace: Thank you, Judge.

(The following transpired within the hearing of the Jury:)

The Court: The Court is going to sustain the last objection and admonish the jury to disregard the question and any other answer given by the witness, as that should not be part of this trial, and it is not part of this trial and

should not be considered, so disregard it. Continue.

(Tr. Trans. from May 19, 1995, at 15-17). This Court's habeas corpus review extends only to ensure that Petitioner was afforded the protections of due process, not to exercise supervisory powers over the Oklahoma state courts. See Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974). The Oklahoma state courts' evidentiary and procedural rulings may not be questioned unless Petitioner demonstrates that the witness's remark was so prejudicial in the context of the proceedings as a whole that he was deprived of the fundamental fairness essential to the concept of due process. Id.; Brinlee v. Crisp, 608 F.2d 839, 850 (10th Cir.1979). The Court is unpersuaded by Petitioner's argument that the introduction of evidence about other crimes requires habeas relief. It is clear from the above-cited exchange that the defense immediately interposed an objection and requested a mistrial. Although the judge refused to grant the defense motion for mistrial, he did sustain the defense's objection to the testimony and admonished the jury to disregard the witness's comment. Viewing the trial as a whole, the Court concludes that the testimony of the witness did not serve to deprive Petitioner of the basic guarantees of due process. See Scrivner v. Tansy, 68 F.3d 1234, 1239-40 (10th Cir.1995). Habeas corpus relief on this claim should be denied.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. The petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied**. Petitioner's motion for speedy disposition (#19) is **moot**.

SO ORDERED THIS 21 day of October, 1999.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JENNETTIE P. MARSHALL,

Plaintiff,

v.

STATE OF OKLAHOMA, STATE DEPARTMENT OF CORRECTIONS, TULSA COMMUNITY CORRECTIONS CENTER,

Defendant.

No. 98-CV-632-K (E)

JUDGMENT

This matter came before the Court for consideration of Defendants' Motion to Dismiss/Motion for Summary Judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendant State of Oklahoma, State Department of Corrections, Tulsa Community Corrections Center, and against the Plaintiff, Jennettie P. Marshall.

ORDERED this 21 day of October, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JENNETTIE P. MARSHALL,

Plaintiff,

v.

STATE OF OKLAHOMA, STATE DEPARTMENT OF CORRECTIONS, TULSA COMMUNITY CORRECTIONS CENTER,

Defendant.

No. 98-CV-632-K (E)

ORDER

Before the Court is Defendant's motion to dismiss or for summary judgment. This motion requests the resolution of Plaintiff's three causes of action as follows: (1) Breach of Contract -- should be dismissed for failure to allege the violation of any contract provision; or in the alternative, summary judgment for the Defendant, because the Department of Corrections ("DOC") disciplined Plaintiff in accordance with its policies and procedures; (2)Title VII -- summary judgment, because the DOC disciplined Plaintiff for non-discriminatory reasons; (3) Wrongful Discipline -- should be dismissed for failure to state a claim of constructive wrongful discharge; in the alternative, should be dismissed, because the Court lacks jurisdiction over the claim due to Plaintiff's failure to comply with the Oklahoma's Governmental Tort Claims Act ("GTCA"), Okla. Stat. tit. 51, §§ 151-71.

I. Breach of Contract

A. Motion to Dismiss

Defendant argues that Plaintiff fails to allege any violation of a contractual provision

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and, therefore, fails to state a claim of breach of contract.

1. Standard for 12(b)(6) Motion

The standard for granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is a strict one. The Court will accept all well-pleaded factual allegations in the complaint as true and will view them in the light most favorable to the non-moving party. *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). The motion will not be granted unless it appears beyond doubt that Plaintiff can prove no set of facts in support of her claim that would entitle her to relief. *See id.*

2. Discussion

Plaintiff alleges that the DOC disciplined her in violation of its Policies and Procedures Manual ("Manual"). More specifically, the Complaint alleges that the Manual created a contractual agreement not to discipline Plaintiff without proper hearings or warnings and that the Defendant breached this contract by disciplining Plaintiff without the required safeguards.

These allegations are sufficient to state a claim for breach of contract. Taking the complaint's well-pleaded allegations as true, the Court finds that the Plaintiff could conceivably prove a set of facts supporting her claim. There is a Manual that provides policies and procedures; this Manual could constitute a contractual agreement, which Defendant could have violated in its disciplining of Plaintiff. Plaintiff has met the low threshold required to state a claim for which relief could be granted. Therefore, Defendant's motion to dismiss Plaintiff's First Cause of Action for failure to state a claim upon which relief could be granted is denied.

B. Motion for Summary Judgment

Defendant argues that undisputed material facts demonstrate that the DOC disciplined

Plaintiff in accordance with its policies and procedures, entitling it to summary judgment on the breach of contract claim.

1. Standard for Rule 56 Motion

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *see also Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494. Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *See Thomas v. International Bus. Mach.*, 48 F.3d 478, 485 (10th Cir. 1995).

2. Discussion

Although Plaintiff has stated a claim for which relief could be granted, she has failed to identify specific facts which demonstrate the existence of an issue to be tried by the jury. According to the documentation submitted by Plaintiff and her assertions in her Response, Plaintiff was disciplined for "failure to cooperate" with DOC investigator, James Sanders. While Plaintiff has focused on the alleged criminal nature of the investigation, she has not demonstrated an issue of cooperation to be tried by the jury. Even if Plaintiff had a right to counsel at her meeting with Sanders, she has not raised any facts to support a finding that her

behavior – refusing Sanders' numerous requests for a meeting over the period of one month – did not constitute a refusal to cooperate with an investigation. Plaintiff has also declined to demonstrate any facts supporting her claim that the DOC disciplined her without proper hearings or warnings.

Viewing the evidence in a light most favorable to Plaintiff, the Court finds that Plaintiff has failed to put forward any facts demonstrating a genuine issue of material fact that would necessitate a jury trial. Based on the undisputed facts presented in Defendant's Motion, the Court finds that summary judgment in favor of Defendant is appropriate in this case.

II. Title VII – Motion for Summary Judgment

Defendant argues that the undisputed material facts show that it disciplined Plaintiff for non-discriminatory reasons, entitling it to summary judgment on this claim. The standard for summary judgment is set out in section I.B.1 *supra*.

Plaintiff has put forth absolutely no facts supporting her claim of discrimination under Title VII. Rather, her Response neglects to address, even in passing, Defendant's evidence that it disciplined her for non-discriminatory reasons. There is no genuine issue as to any material fact, and Defendant is entitled to judgment as a matter of law. It is therefore appropriate for the Court to grant Defendant's motion for summary judgment on this claim.

III. Wrongful Discipline/Constructive Wrongful Discharge

A. Motion to Dismiss for Failure to State a Claim or Lack of Subject-Matter Jurisdiction

Defendant argues that Oklahoma law does not recognize an action for constructive wrongful discharge. Defendant also argues that, because Defendant has failed to comply or allege compliance with the GTCA, the Court lacks subject matter jurisdiction to hear this

claim.

A claim of wrongful discharge is a tort claim. *See Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218, 1222 n.10. Plaintiff alleges, in her Complaint, that she was wrongfully discharged by the DOC. The DOC, as a statewide agency, is part of the state for sovereign immunity analysis. *See, e.g., Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981). It is long settled that a state can waive sovereign immunity in its own courts without doing so in federal court. *See Smith v. Reeves*, 178 U.S. 436, 441-42, 445 (1900). A state will have waived its immunity in federal court "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (citation omitted) (alterations in original). The GTCA waives state sovereign immunity to certain tort claims, but provides that "[i]n so waiving immunity, it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution." Okla. Stat. tit. 51, § 152.1(B). Oklahoma has not waived its tort immunity in federal court. *See Ramirez v. Oklahoma Dep't of Health*, 41 F.2d 584, 589 (10th Cir. 1994). Therefore, Plaintiff's claim against Defendant for wrongful discharge must be dismissed for lack of subject-matter jurisdiction. Having decided the Court lacks jurisdiction, it is inappropriate for the Court to address whether Plaintiff has stated a claim of wrongful discharge under Oklahoma's common law.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss/Motion for Summary Judgment (# 9) is GRANTED in part and DENIED in part as follows: Defendant's motion to dismiss Plaintiff's First Cause of Action under Fed. R. Civ. P. 12(b)(6) is DENIED;

Defendant's motion for summary judgment on Plaintiff's First Cause of Action is GRANTED; Defendant's motion for summary judgment on Plaintiff's Second Cause of Action is GRANTED; Defendant's motion to dismiss Plaintiff's Third Cause of Action under Fed. R. Civ. P. 12(b)(1) is GRANTED; Defendant's motion to dismiss Plaintiff's Third Cause of Action under Fed. R. Civ. P. 12(b)(6) is DENIED as MOOT due to the Court's lack of subject-matter jurisdiction over that claim.

ORDERED this 21 day of October, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBY EARL JONES,

Petitioner,

vs.

STEVE HARGETT, Warden,

Respondent.

Case No. 97-CV-1011-K (M)

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

SO ORDERED THIS 21 day of October, 1999.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

21

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICHARD K. LEE,

Plaintiffs,

v

FIRAMADA, INC., a Texas corporation; ARIF ADAM and IRA MONAS,

Defendants.

ENTERED ON DOCKET
DATE OCT 25 1999

FILED
OCT 22 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99CV0391K (E)

ORDER OF DISMISSAL WITHOUT PREJUDICE

COMES ON for consideration the Plaintiffs' Motion for Voluntary Dismissal Without Prejudice. Upon consideration of the pleadings and argument of counsel, the Court finds that said Motion should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the claims of the Plaintiffs, Richard K. Lee, et al., asserted herein against the Defendants, Firamada, Inc. and Arif Adam, are hereby dismissed without prejudice to their refiling.

SIGNED this 21 day of October, 1999.

UNITED STATES DISTRICT JUDGE

APPROVED:

Cleve W. Powell — OBA #11609
Attorney and Counselor at Law
1223 E. Highland Ave., Ste. 311
Ponca City, OK 74601-4653
(580) 761-3100
(580) 762-3169 [facsimile]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN ZINK COMPANY,
Division of Koch Engineering, Inc.,

Plaintiff,

vs.

ZINKCO, INC., JOHN SMITH ZINK, and ZEECO, INC.,

Defendants.

ENTERED ON DOCKET
DATE OCT 22 1999

Case No. 85-C-292-K(M)

FILED
IN COURT
OCT 20 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

This matter comes before the Court on the Court's February 23, 1999 denial of the objections of Plaintiff and Defendants to the Magistrate's Report and Recommendation of February 18, 1998 and affirmance of the Magistrate's Report and Recommendation; the Court's February 23, 1999 denial of Defendant's Motion to Modify the Injunction; and the Court's affirmance of the Magistrate's Report and Recommendation entered September 20, 1999. Based on the aforementioned, the Court hereby enters judgment in favor of Plaintiff and against Defendants on the issue of contempt and awards Plaintiff $189,609.36 in attorney's fees and costs.

IT IS SO ORDERED.

This 19 day of October 1999.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

279

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LENORA WILLIAMS,

Plaintiff,

v.

COMMUNITYCARE HMO,

Defendant.

No. 99-CV-664-K (E)

JUDGMENT

This matter came before the Court for consideration of Defendant's Motion for Summary Judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant, CommunityCare HMO, and against the Plaintiff, Lenora Williams.

ORDERED this 19 day of October, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DALE JENKINS

Plaintiff

vs.

Case No. 99CV0500E

CHATHAM REINSURANCE CORPORATION and EVERGREEN NATIONAL INDEMNITY COMPANY

Defendants

STIPULATION OF DISMISSAL OF SEPARATE DEFENDANT, CHATHAM REINSURANCE CORPORATION

Come now the parties who have appeared in this action, Dale Jenkins, by and through his counsel, Keith Blythe and Heath Hardcastle, and the Separate Defendant, Chatham Reinsurance Corporation, by and through its counsel, John B. Hayes, and pursuant to Rule 41(a) (1) of the Federal Rules of Civil Procedure, stipulate that the Petition filed against the Separate Defendant, Chatham Reinsurance Corporation, and all amendments thereto and causes of action in favor of the Plaintiff arising out of the facts

alleged in the Petition against Separate Defendant, Chatham Reinsurance Corporation, are dismissed without prejudice.

Stipulated and Agreed this 13th day of October, 1999.

M. KEITH BLYTHE, Attorney for Plaintiff, Dale Jenkins

HEATH E. HARDCASTLE, Local Counsel for Plaintiff, Dale Jenkins , OBA #14247
Albright & Rusher
15 West 6th, Suite 2600
Tulsa, OK 74119-5434
(918) 583-5800

JOHN B. HAYES, Attorney for Separate Defendant, Chatham Reinsurance Corporation

alleged in the Petition against Separate Defendant, Chatham Reinsurance Corporation, are dismissed without prejudice.

Stipulated and Agreed this 13th day of October, 1999.

M. KEITH BLYTHE, Attorney for Plaintiff, Dale Jenkins

HEATH E. HARDCASTLE, Local Counsel for Plaintiff, Dale Jenkins

JOHN B. HAYES, Attorney for Separate Defendant, Chatham Reinsurance Corporation

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 99CV0656K(J)**
	)	
BERE A. BOWMAN,	)	
	)	
Defendant.	)	

DEFAULT JUDGMENT

This matter comes on for consideration this 19 day of October, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Bere A. Bowman, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Bere A. Bowman, was served with Summons and Complaint on August 10, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Bere A. Bowman, for the principal amount of $2,804.96, plus accrued interest of $1,917.11, plus interest thereafter at the rate of 8.41 percent per annum until judgment, plus filing fees in the amount of

$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.411 percent per annum until paid, plus costs of this action.

United States District Judge

Submitted By:

PHIL PINNELL, OBA # 7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918)581-7463

PEP/llf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DWAYNE GARRETT,

Plaintiff,

v.

STATE OF OKLAHOMA, JERRY MADDOX, PAUL SIEGLER, DIANN YOUNG, SHELLY CLEMMONS, CURTIS DeLAPP, and MARGARET SNOW,

Defendants.

No. 99-CV-742-K (E)

ORDER

Before the Court is Defendants Jerry Maddox and Margaret Snow's motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim upon which relief can be granted.

The Plaintiff in this case has failed to respond to the Defendant's motion to dismiss. Pursuant to *N.D. LR 7.1(C)*, all claims asserted in a motion may be considered confessed when the opposing party has failed to respond. The Court has, nevertheless, reviewed the Defendants' motion to dismiss, and, through an independent inquiry, has determined that the Plaintiff has failed to state a claim for which relief can be granted.

For the reasons stated herein, Defendant Jerry Maddox and Margaret Snow's Motion to Dismiss (# 2) is GRANTED and all claims in the above-captioned action against Defendants Maddox and Snow are DISMISSED.

ORDERED this 20 day of October, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DWAYNE GARRETT,

Plaintiff,

v.

STATE OF OKLAHOMA, JERRY MADDOX, PAUL SIEGLER, DIANN YOUNG, SHELLY CLEMMONS, CURTIS DeLAPP, and MARGARET SNOW,

Defendants.

No. 99-CV-742-K (E)

ORDER

Before the Court is Defendants Shelly Clemmons and Curtis DeLapp's motion to dismiss under Fed. R. Civ. Pro. 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

The Plaintiff in this case has failed to respond to the Defendant's motion to dismiss. Pursuant to *N.D. LR 7.1(C)*, all claims asserted in a motion may be considered confessed when the opposing party has failed to respond. The Court has, nevertheless, reviewed the Defendants' motion to dismiss, and, through an independent inquiry, has determined that the Plaintiff has failed to state a claim for which relief can be granted.

For the reasons stated herein, Defendants Shelly Clemmons and Curtis DeLapp's Motion to Dismiss (# 7) is GRANTED and all claims in the above-captioned action against Defendants Clemmons and DeLapp are DISMISSED.

ORDERED this 22 day of October, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STAN NENA,

Plaintiff,

v.

MIKE VOLK CO. and IMCO RECYCLING, INC.,

Defendants.

No. 99-CV-704-K (J)

ORDER

Before the Court is Defendant IMCO Recycling, Inc.'s ("IMCO's") motion to dismiss Plaintiff's claims against it under Fed. R. Civ. Pro. 12(b)(6). IMCO alleges that Plaintiff fails to state a claim upon which relief can be granted, because his claim is preempted by the exclusive remedy of workers' compensation under Oklahoma law.

Standard for 12(b)(6) Motion

The standard for granting a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) is a strict one. The Court will accept all well-pleaded factual allegations in the complaint as true and will view them in the light most favorable to the non-moving party. *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). The motion will not be granted unless it appears beyond doubt that Plaintiff can prove no set of facts in support of his claim and which would entitle him to relief. *See id.*

Discussion

Plaintiff has not alleged intentional action by Defendant IMCO justifying an exception to the exclusive nature of Oklahoma's workers' compensation remedy. Oklahoma's workers'

compensation law places strict liability on an employer for the injuries of its employees. *See* Okla. Stat. tit. 85, § 11(a). This remedy, however, is the employee's exclusive remedy. *See id.* § 12. Workers' compensation intends to recompense workers for accidental injuries and therefore does not preempt suits against employers for intentionally inflicted injuries. *See Tyner v. Fort Howard Paper Co.*, 708 F.2d 517, 518 (10th Cir. 1983).

The intention necessary to bypass workers' compensation is a difficult standard for a plaintiff to meet. Gross, willful, and wanton negligence are insufficient. *See Love v. Flour Mills of America*, 647 F.2d 1058, 1060 (10th Cir. 1981). Even the following fail to state a claim of intentional infliction: "knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a safety statute . . . ." *Tyner*, 708 F.2d at 518 (quoting *Love*, 647 F.2d at 1060 (quoting 2A Larson, Workmens' Compensation Law ¶ 68.13 (1976))). The Tenth Circuit has repeatedly noted that "nothing less than genuine intent to injure makes an injury 'intentional' for purposes of the [Workers' Compensation] Act." *Id.* In *Tyner*, the Tenth Circuit rejected a worker's claim, noting that "[n]owhere in their complaint . . . did the plaintiffs allege that [the employer or its agent] had acted with the intention of injuring the decedent." *Id.* at 518 (finding that foreman's removal of safety lock and subsequent electrocution of worker did not constitute intentional injury to circumvent workers' compensation). The Tenth Circuit has quoted with approval Larson's Workmen's Compensation Law where it notes that an "intentional removal of a safety device or toleration of a dangerous condition" does not rise to the level of the "deliberate infliction of harm comparable to an intentional left jab to the chin" required before an employee can sue in spite of workers' compensation's exclusivity. *See Love*, 647 F.2d at 1060 (quoting Larson,

supra).

Plaintiff has failed to allege this level of intentional infliction of harm. Rather, Plaintiff's allegations fall under the insufficient claims cited above – failure to provide a safe working environment; intentional removal of safety guards; failure to provide proper lock out/tag procedures; directing employees to repair conveyor while operating, knowing of the dangers involved; not having proper emergency shut off controls and warnings on the conveyor; and violating federal regulations and state safety statutes. (Pl.'s Petition ¶ III.) As noted by the Oklahoma Court of Civil Appeals, the liberal use of the phrase willfully and knowingly does not add anything to a failure to allege acts sufficient to support a claim of intentional injury. *See Roberts v. Barclay*, 369 P.2d 808, 810 (Okla. Ct. App. 1962).

Moreover, the cases cited by Plaintiff fail to support his claim of intentional injury in this case but rather deal with "jab to the chin" claims. *See Pursell v. Pizza Inn, Inc.*, 786 P.2d 716, 716 (Okla. Ct. App. 1990) (injuries resulting from intentional or willful sexual battery by supervisor); *Thompson v. Madison Mach. Co.*, 684 P.2d 565, 566 (Okla. Ct. App. 1984) (injuries sustained in fight with co-employee who hit plaintiff in face with wrench). Finally, *Ragsdale v. Wheelabrator Clean Water Systems, Inc.* does not shed any light on this case. 959 P.2d 20 (Okla. Ct. App. 1998). Rather, in language that casts doubt on Plaintiff's interpretation, it openly states that it does not decide whether Okla. Stat. tit. 40, § 178 provides an exception to workers' compensation, in light its inapplicability to the claim at issue. *See id.* at 22.

Plaintiff fails to state a claim of intentional infliction of injury by IMCO, rendering his claims preempted by the Workers' Compensation Act, Okla. Stat. tit. 85, §§ 1 *et seq.*

IT IS THEREFORE ORDERED that Defendant IMCO Recycling, Inc.'s Motion to

Dismiss (# 6) is GRANTED.

ORDERED this 20 day of October, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE